Devolution and Decentralisation in Social Security

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Devolution and Decentralisation in Social Security

A European Comparative Perspective

Editors • Gijsbert Vonk • Paul Schoukens

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In many countries regional and local authorities are given more powers in the field of social security. Supposedly, this is a general trend taking place throughout the developed world and beyond.
In this volume the processes of devolution and decentralisation in social security are researched from a comparative European perspective, taking into account the constitutional setting and the architecture of the social security systems. The book includes thirteen country studies based on a uniform format and three overarching contributions.
The greater picture that emerges is that social insurance and family allowances are still very much a national competence and are predominantly functionally decentralised to a number of specialised agencies and institutions. There are only limited exceptions. A different conclusion must be drawn when we look at social assistance and social care. In many countries the role of local authorities has gradually increased over a longer period. However, in some countries this trend is reversing, and municipal powers are being limited or even taken back by central government.
Devolution and Decentralisation in Social Security shows how complex, differentiated and nationally diverse the state of devolution and decentralisation in Europe actually is. This book is of particular interest to scholars in the field of social policy and social security, constitutionalists and policy makers who are interested in local administration.

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Preface

This book is the result of an initiative taken at the annual conference of the European Institute of Social Security in 2016. The purpose of this initiative was to map out the present state of devolution and decentralisation in social security in Europe. A group of social security specialists convened to write national contributions based on one overarching framework. This has resulted in thirteen country studies. Additionally, there are two general introductory chapters dealing with key notions pertaining to this study, such as federalism, deconcentration, devolution, territorial versus functional decentralisation, etc. All chapters are preceded by a broad general overview of the background of this study and the main results.

We are greatly indebted to all authors who voluntarily engaged in this project. We also thank the publisher and two visiting students from Down Under at the University of Groningen for their support in the preparatory and editorial work. Hanneke and Robert: may you fare well.

On behalf of the authors,

Paul Schoukens and Gijsbert Vonk

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Part I

General background

The state of devolution and decentralisation in social security, a comparative European analysis: an introduction to this edited volume

Paul Schoukens and Gijsbert Vonk

1 Introduction

In many countries regional and local authorities are given more powers in the field of social security and welfare. This shift of power from the central to regional and local level is not limited to one or two countries only. Supposedly, it is a general trend taking place throughout the developed world and beyond (Stegarescu 2004; Kazepov 2010; Andreotti, Mingione, Polizzi 2012).

Different theories are suggested to explain the trend, ranging from the impact of globalisation (hence the composite: 'glocalisation') to the emergence of new forms of regional power centres (hence the term: regionalisation). It is often pointed out that the localisation trend follows new public managerial principles and new governance styles. Decentralisation facilitates managerial autonomy: higher levels of government retreat from direct control (in the form of regulation of earmarked grants) to allow lower levels of government to decide how overarching goals are met, ('steering not rowing') (Kazepov 2010). Some authors stress that the changing role of municipalities is linked to attempts to make the welfare state more responsive to the needs of the individual and civil society (Bannink, Bosselaar and Trommel 2012). According to this narrative the decentral level can do this better because its operates in closer alignment to local institutions. In the same breath, there is an apparent link with activation policies, as these policies must be responsive to the situation of the clients and take into account the local labour market situation (Berkel & Borghi 2008). Also strategies aimed at cost reduction in the welfare state may be a factor underlying the localisation trend (Andreotti, Mingione, Polizzi 2012).

A different situation arises when the shift away from the central level is rooted in a processes of constitutional devolution. Some states are actively redefining the division of power between the central state and federated sub-states or regions, a process which may affect the architecture of the social security system and the welfare

state at large, as is visible in some countries such as Belgium (Cantillon, Popelier, Mussche, 2011) and the UK (Spicker 2015).

While some are optimistic about the trend of devolution and decentralisation in social security, dreaming of 'crafted welfare landscapes' (Bannink, Bosselaar en Trommel 2012) or the prospect of 'social welfare cities' (Albertson and Diken 2013), others are sceptical, fearing for example that the process is undermining national solidarity or that central government is simply throwing its austerity objectives over the fence to regional or local authorities, where social schemes then have to compete with other useful or less useful issues, such as the sewer, the industrial site or a new town hall (Waquant 2008). Some see it as a cover up for a *de facto* privatisation of social services; local authorities which are faced with increasing social responsibilities contract their activities out to third parties who perceive this as a lucrative source of income or investment. (Raco 2013). Whatever can be said about this, it is clear that devolution and decentralisation in social security impacts on the architecture and functioning of the welfare state.

Much academic research focuses on the underlying factors of the territorial shifts in the welfare state and the effects it has on governance and the financing and structure of local services. There are useful country studies dealing with the process of devolution and decentralisation. Some of these focus on financial and economic aspects. The OECD even has a Fiscal Decentralisation Database. Other national studies may focus on governance aspects (for example Kazapov 2010) or certain system characteristics (for example Vandenbroucke and Luigjes 2017). What has been lacking so far, in our view, is an overview of the state of devolution and decentralisation in different countries, presented from a perspective of social security law. It is the aim of the volume to help to address this *lacune* by presenting thirteen country studies dealing with the way social security powers are distributed between the various levels of government.

When we refer to social security law, we mean the body of law dealing with providing income security in the case of poverty or in the case of the occurrence of social risks such as unemployment, invalidity, old age, etc. It covers both social insurance and social assistance and all the hybrid forms which come in between. The term social welfare is wider. It includes the spectrum of government action intended to make sure that citizens meet their basic needs, such as education, housing, child care and health. Also, social welfare does not only refer to cash benefits schemes, but also to various types of services and in-kind programmes which are sometimes considered to fall outside the social security domain, such as probation and parole. The core object of this study is social security but sometimes incursions into the social welfare domain are made, especially when general reference is made to local social responsibilities where social assistance operates side by side with other social care and health care services for vulnerable groups.

This volume pays attention to social security law as it operates in the wider constitutional framework. In our view, this constitutional framework is an important

one, not only for this study but also in practice. After all, many day-to-day questions which arise from devolution and decentralisation are eventually of a constitutional nature. For example, in the case of policy conflicts who has the final say: central government, the regional government or the local government; are differences in levels of protection from region to region or from local authority to local authority legally justified; to what level of government are local or regional authorities accountable, etc.? This volume holds the key to the answers to questions such as these in a number of selected countries.
Below in Section 2 we will first clarify the method used and the setup of the study. We then present a number of general findings which can be deduced from the country studies in Section 3. We conclude with a number of suggestions for further research in Section 4.

2 Setup and method of the research

This volume contains thirteen country studies and two introductory chapters. We make a number of remarks about both parts.

2.1 The introductory chapters

Apart from providing a number of useful clarifications of the concepts of federalism, devolution, decentralisation and deconcentration, Danny Pieters' introductory chapter contains a systematic analyses of the division of power between the layers of government in a number of European countries, as well as non-European countries including Australia, Brazil, Canada, China, India and the USA. It is based on his own research carried out previously and published in the Dutch language (Pieters, 2014). Most of all, this chapter makes clear how complex the question of the division of powers in social security is when one tries to make international comparisons. There are three factors to be taken into account. Firstly, the situation differs from country to country; secondly it differs from branch to branch of social security (e.g. social insurance for income replacement schemes such as old age, unemployment and work incapacity; social insurance for cost compensation schemes such as family allowances, health care and long term care; and social assistance schemes); thirdly it differs according to the specific functions involved (i.e. regulatory, administrative, financing, etc.). What results is a true social security power conundrum, which Pieters unravels by presenting a number of thematic graphs where the situation in each of the countries is depicted in a number of colours. The overall conclusion is that social security is to a large extent still a federal matter in many countries, yet with some identifiable exceptions. The federated states will often be competent in the area of social assistance and welfare, care and healthcare. A second group of exceptions to the federal prevalence in social security applies to family benefits, including benefits for studying: Belgium, Germany,

Switzerland and Canada provide examples of this. Also federated entities may have extensive competences to regulate, administer and finance social security schemes applying to their own civil servants.
Ulrich Becker's introduction does not deal with the territorial division of power but with functional decentralisation in social security, in particular arising from the co-operation between employers and employees. This is a different subject altogether but we felt that it was necessary to pay attention to it because – as we will show below – it is the prevalent form of decentralisation in social insurance. Where territorial devolution and decentralisation are absent, this does not infer that there is no decentralisation at all. Social security powers are entrusted to specialized social security institutions. In many countries these are run by employers and employees. Becker refers to this type of decentralisation as a form of social self-government. He remarks that this is not just a question of states transferring power to functionally decentralised institutions but a form of governance which ensues bottom up forms of cooperation between labour and capital. But he also shows that in reality the relations between the different levels of government are always closely intertwined. In a certain way, Becker continues, one may distinguish a societal bottom-up and a legal top-down perspective, as every social insurance institution needs a founding legal act of Parliament in order to come into existence. After discussing the state of functional decentralisation in Germany and in Europe, Becker concludes that despite criticism the notion of social self-governance is still a democratic one. Firstly, it supports the autonomy of social security politics, by keeping the general budget separate from the social insurance budget. Secondly and much more importantly in Becker's eyes: social self-government serves as a sort of institutional anchor, stressing the responsibility of the most important groups of labour market participants for a well-performing social security system.

2.2 *Country studies and questionnaire*

The thirteen states under investigation are Austria, Belgium, the Czech Republic, Germany, Hungary, Italy, the Netherlands, Slovenia, Spain, Sweden, Switzerland, Turkey and the UK. The choice of these countries and indeed of the authors that cover them is a consequence of procedure. As part of the preparations of the 2017 EISS annual conference in Amsterdam, we made a call for country papers to be written on the basis of a centrally provided index covering both elements of devolution and decentralisation in social security. Included are the authors and countries that presented themselves. Fortunately, all the relevant regions of the continent are represented: Scandinavia, Western-Europe and the UK, Southern Europe and former Eastern-Europe. All authors are (social security) lawyers with an exception of Battaglini (Italy), Ifan and Poole (UK), Yıldırım (Turkey) and Juhász (Hungary) who have a background in social science.

As was mentioned, the chapters on the state of devolution and decentralisation in each of the countries was based on a questionnaire. We refrained from giving too detailed instructions, but asked the authors to use the index as a guideline. Depending on the situation in the country, some elements required more attention than the others. Authors were nevertheless urged to address various issues in the order of the questionnaire, so as to allow a more easy 'horizontal screening' of the findings.

After a general introduction into the system of social security and the administrative organisation, the questionnaire falls into two parts, one dealing with devolution and one dealing with decentralisation. For many authors this distinction was a brain teaser. Indeed, the two concepts may overlap and as Pieters points out in the general introductory chapter in this volume, the notion of devolution in itself is a problematic one. He explains that it is particularly used in the specific context of the unwritten British constitutional doctrine. The supremacy of the Houses of Parliament infers that even when competences are given to or recognised as belonging to the nations of Scotland and Wales, this is first and foremost done through Acts passed by Parliament in the Palace of Westminster. In the UK this transfer of power is referred to as devolution. Pieters considers this as a specific form of 'federalism', although he concedes that the use of this term would probably be rejected in London and perhaps also in Edinburgh. Whatever can be said about this, according to Pieters, devolution in the UK cannot be branded as just a form of decentralisation as this would be at odds with the sovereignty of the British nations, Scotland, Wales and Northern Ireland, to exercise the devolved powers.

Pieters avoids the use of the term devolution outside the British context and rather refers to federalism. In this volume, we use the term devolution as synonymous to federalism. The term is intended to refer to the position of social security in the constitutional architecture of a country whereby powers are vested to recognised constitutional entities other than the central state (sub-states, regions, etc.). 'Decentralisation' rather refers to the division of managerial and administrative powers within the system of social security itself and presupposes a process of stronger involvement of the regional and/or the local level, although the higher level of government may well maintain a supervisory role. A characteristic of decentralised powers is that they can be resumed by the higher level of government if that higher level so desires. Reversely, devolved powers are constitutionally entrenched in the lower level of government This is also Pieters' understanding of the difference between these two concepts: in federal states, powers which are vested by the constitution in the constituent states cannot be reclaimed by the federation.

In the index, under the umbrella of *devolution* the authors were asked to describe the constitutional characteristics of the state, the constitutional background of social security and the division of social security competences between the various layers of government.

Under the umbrella of *decentralisation* the authors were asked to provide information about a number of powers and tasks which are exercised on a local level: policy, determining claims and delivery of services, third party delivery, supervision, financing, client involvement. They were also asked to reflect on the so called decentralisation paradox, i.e. do more local powers lead to more reporting duties to the national level or national interference through the backdoor of alternative steering instruments, such as financial incentives?
The last part of the index was reserved for a free treatise on the state of the debate and the future.
Schematically, the index has the following structure:

1. A general picture of the system of social security and the administrative organisation
2. The state of devolution
    a. Historical remarks
    b. Constitutional setting
    c. The division of comptences between the layers of government
        i. State structure (i.e. federal, confederal, unitary)
        ii. Division of competences in social security
        iii. Local responsibility or solidarity between local states/regions
3. The state of decentralisation
    a. Historical remarks
    b. Constitutional setting
    c. Functional decentralisation versus territorial decentralisation
    d. The powers of the local decentralised level
        i. Policy
        ii. Determining of claims and delivery of services
        iii. Local authorities and third party service delivery
        iv. Supervision
        v. Financing
        vi. Client involvement
        vii. Decentralisation paradox? (i.e. do more local powers lead to more reporting duties to the national level or national interference through the backdoor of alternative steering instruments, such as financial incentives)
4. The state of the debate and future perspectives
    a. Arguments in favour and against of devolution and decentralisation
    b. Plans, visions and dreams

3 Some reflections on the outcome of the country studies

So what do the country reports tell us about the state of devolution and decentralisation in Europe? It is a patchwork and not easy to draw general conclusions, but there are some common elements.

It is important to make a distinction between social insurance schemes (including health care insurance) and family allowances (excluding study grants) on the one hand and social assistance and social and health care services on the other. The greater picture that emerges is that social insurance and family allowances are a national competence and predominantly functionally decentralised to a number of specialized agencies and institutions. Only the Flanders care insurance scheme introduced in 2001 and the Belgian and Swiss family allowances constitute notable exceptions.

Social insurance institutions may operate with regional of local offices which may have a degree of policy or administrative discretion, but this should not be confused with territorial decentralisation as this is defined by Pieters and by ourselves; these are functionally decentralised institutions with representations in the regions and local communities. Of course the situation becomes slightly more murky when these local branches of social insurance offices operate in close co-operation with the social offices of the regions and the municipalities. Examples, of such forms of hybrid constructions are reported *inter alia* in the Netherlands, where local authorities share one stop offices with the agency responsible for the administration of employee insurance schemes.

An important aspect of the national character of social insurance it that it applies to all the countries under investigation, including the countries which cannot be classified as a unitary state but as a (con)federation, i.e. Austria, Belgium, Germany and Switzerland. It also applies to formally unitary states which generally speaking recognize much powers for the regions, such as Italy, Spain and the UK. So it seems that the division of power in social insurance is much rather governed by principles as described by Ulrich Becker in the introductory chapter of this volume. This does not mean to say that social insurance does not innovate, but that it has remained immune from the forces of devolution and territorial decentralisation. In this respect, after more than 100 years of history, social insurance is still very much a creed of its own. This apparent strength of social insurance and its institutional framework may come somewhat as a surprise in itself.

A different conclusion must be drawn when we look at social assistance and social and health care (including long term care). We will now refer to these categories as social assistance and care. Firstly, these are not necessarily a national competence. In fact, in our countries this is not the case in Switzerland, Spain and for different reasons partly in the UK and in Italy. Secondly, in the other countries where social assistance and care are a national competence, very often there is a substantial role for the municipalities. They have been attributed with a range of powers and tasks

dealing with policy, administration and service delivery. In Sweden these powers have gradually increased over a longer period, but power extensions are also reported in other countries, most notably in Belgium, the Czech Republic, Hungary, the Netherlands and the UK. Interestingly, however, this is not a universal trend. In Turkey, the Czech Republic, Hungary and in Slovenia we see a reverse trend with municipal powers being limited or even taken back by central government. Interestingly, a reverse trend is also reported for Germany. In his country study the author Rixen reports that while that while the social federal state in Germany is implemented on a decentralised basis, social security legislation does not leave a great deal of room for diversity. Uniformity reigns behind a façade of decentralisation.

There are different reasons for this reverse trend in these countries. In Turkey the specific internal political situation seems to play a role. In the other three countries it is the result of central government attempts to control and improve service delivery. Whatever the reasons, for us this outcome should give some pause for thought: there is a trend towards decentralisation but this is not as universal as many commentaries *(infra* Section 1) suggest.

The process of decentralisation in the field of social assistance and care is mimicked by most regional governments with shared or autonomous powers, but not necessarily. Thus, for example, Battaglini reports that in Italy some regions keep the administration of the schemes in their own hand, while some others have decentralised this task to the municipal level.

More decentralised powers do not preclude a supervisory role for the central government. Also the central state may offer the financial means for the social responsibilities of the local authorities, which then often enjoy a large degree of discretion as to how to spend these means. But as Pieters points out in his introductory chapter, these forms of central government control and support are not contrary to the notion of territorial decentralisation. Under the notion of 'decentralisation paradox', authors reported an increase of central government supervisory powers. But there are also reverse examples, for example in the Netherlands where the central supervisory powers with regard to social care have recently been decentralised as well.

The responsibility of the local authorities in the area of social assistance and social care does not preclude that these authorities have to share this responsibility with functionally decentralised, read: specialized care institutions. Indeed, in all the countries under investigation the existence of such specialized institutions is reported. Neither does local social responsibility exclude the involvement of private organisations which are contracted by the authorities for service delivery. All the country reports give examples of this, not so much in the area of social assistance, but very much so with regard to care services. These observations coincide with the literature on this social and health care infrastructure which in many countries is rooted in civil society organisations and then transformed into a mix of special-

ized public or private institutions which are increasingly placed under government control (for example Bode 2008). The Swedish country study also suggests another explanation for the increasing role of private care institutions service delivery: the advantage that the private sector holds over the public sector in the development of eHealth.

In our view the evidence of the involvement of third parties actors in the emerging decentralised local welfare states is related to the development of quasi markets in which third parties compete for local government contracts. (Le Grand 1991). In this market model, the third parties can be private enterprises, non-profit organisations or even specialised government agencies. Profit is not the only relevant factor in this competition. What matters is that the actors manage to win government contracts on a structural basis. For this they have to build up co-operative networks, not only with local government but also amongst each other. Central government bears final responsibility for this system, but local government is put in charge. This is steering and not rowing whereby the central state makes use of the instrument of decentralisation as its helm and whereby local government calls in the aid of (private) third parties to realise the decentralised responsibilities.

4 Further research agenda: challenges for the local welfare state

Our legal approach to devolution and decentralisation calls for further research into the reported phenomenon of the rise of the local welfare state.

The first theme which has been mostly absent in the present volume relates to the question of how EU law impacts upon the local welfare state and its relations with higher levels of government and vice versa. This research is to make clear that the question of the future of EU social security law and policy should be phrased in the context of a multi-layered spectrum of division of powers and responsibility from the very bottom of the local welfare state to the top of EU decision making. The ultimate objective is to analyse the 'logical order' according to which powers and responsibilities can be arranged in this spectrum, from the point of view of common interests. For example, if it is apparent that a fear of social benefit tourism at local level gives rise to the introduction of restrictive access conditions for outsiders, would it be logical to define this terrain as a local prerogative or should such restrictions rather be regulated at a higher state or at European level? According to which logical criteria should this question be answered? How can European solidarity and freedoms, national unity and local interests be reconciled in a manner that corresponds with the objectives of the project of social security itself? The latter question also touches upon the emergence of local quasi markets in the social field. EU law traditionally employs a strict dichotomy between the free market and the public sector. Social markets do not fit into this dichotomy: without further regulation (or exemptions granted in EU-case law) hybrid public/private institutions will be broken up. Either they have to behave as commercial undertakings or they

should be absorbed in the classical public domain. The European Commission is aware of this problem and has therefore developed the 'social services of general economic interest' framework which is intended to protect the needs of vulnerable citizens and is based on the principles of solidarity and equal access. The question is here whether the EU legal framework is conducive to developing such services.

A second, yet related research theme applies to the impact of new governance preferences which underlie the rise of the local welfare state. Adreotti et al succinctly sum up the arguments that are used to underpin these preferences: the local welfare state is considered to be more effective, more participative (democratic) and more sustainable (Andreotti, Mingione and Polizzi 2011). The effectiveness argument is based on the postulate that in complex societies individual needs are met with higher accuracy by welfare policies that are tailored more closely to their specific context. The democratic argument relies upon the idea that the localisation of policies will facilitate the activation and participation of non-governmental actors in decision-making, therefore opening the arena to civil society organisations and strengthening democracy. Lastly, the search for improved provision and sustainability of services at the local level may be rooted in the need to contain increasing costs of the national welfare state by giving more narrowly defined duties to local governments in terms of financing and/or spending, and by raising new resources for welfare needs from local economic actors and social groups.

But it is important to put some of these arguments in favour of local social governance to the test. In order to do this it is important to gain insight into the type of legal and institutional arrangements to which new forms of local governance have given rise and how these fit into the wider constitutional requirements of the rule of law. Doing so is not a goal within itself. The purpose is to test whether these new arrangements live up to the promise of proximity and democracy, from the point of view of the experience and perspectives of the citizens and their representative organisations (client groups, unions, etc.). Indeed, there is a small but growing body of academic literature that warns of the danger of contracting out large parts of the local services to commercially operating third parties: the ambitions of the new governance ideology are not always easily met, even to the extent that that 'new localism' is considered to be tantamount to 'the demise of the democratic state' (Raco 2015). This critical hypothesis is to be put to the test: to what extent do new legal and institutional arrangements genuinely serve the interest of the local citizens? Answering this question requires an evaluative approach that makes use of case studies of different local welfare regimes that have come into being in cities and regions in Europe.

A final research theme relates to migration. Here, the challenges faced by local government do not necessarily run parallel with those of national governments. The pressures of globalisation are most manifest in urban conglomerations. 'Global cities' (Sassen 2001) attract economic activities from all over the world along with various categories of migrants, all somehow contributing and participating in the

local communities. While national governments of developed states are faced with the task of controlling immigration, cities on the other hand are faced with the reality of the presence of immigrants who must be integrated in the communities. The absorption capacity of local communities is, however, not unlimited and where cities are confronted with sudden influxes of newcomers, local authorities may be inclined to raise barriers to access to local welfare services, which, conversely, may run contrary to national or EU legal standards. The more social autonomy local communities enjoy, the more the level of services and eligibility conditions will become sensitive to migration conditions. At what level can benefits and services be set and how can the personal scope be defined in such a way that services only apply to those who have a genuine bond with the local community? It is interesting to study the migration policy dynamics at a local level, to find out how these dynamics affect the conditions applying in the local welfare state and to analyse the interaction of these conditions with national and European law.

Federalism and devolution in social security

Danny Pieters

1 Federalism, decentralisation and 'deconcentration'

In this article we will examine the strongest form of local power that a state can recognise, i.e. when the constitution of a state gives autonomous competence to (some of its) territorial components. We speak in such cases of (territorial) federalism. We will use the notion of federalism in this broad sense, being aware that some countries might find it very disturbing to be qualified as 'federal'. Our purpose, however, is not to analyse the constitutional situation of countries, but simply to examine in what way the fact that a constitution directly assigns autonomous powers and competencies to territorial components also affects the social security in these, what we qualify here as, 'federal states'. The territorial components of such aggregated states will hereafter be labelled as 'constituent states' or 'federated entities'.

A federation's constitution will establish the distribution of competence between the federation and the constituent states, the 'federated entities'. Each of these will be accorded their proper competences, be they exclusive or not; but the situation can also involve co-operation procedures between the federation and the states or between the federated entities. As far as social security is concerned, the constitution can keep the entire social security system at one single level; in most cases, however, the constitution will spread competence over both the federation and the constituent states. In this respect, constitutional provisions can distinguish between the diverse benefit branches of social security, the distinct social insurance and social assistance schemes and so on. In addition, competences like legislation, implementation, judicial enforcement and judicial protection do not necessarily have to be located at one and the same level. The same goes for the financing of social security: the federation's constitution will often allocate competences and responsibilities to both the federation and the constituent states.

When the constitution grants competence in social security matters to the constituent states, these states can sometimes decide, at their own initiative, to execute the

competence bestowed on them jointly (either completely or partially); or they may interact in somewhat looser forms of co-operation and consultation.

We make a distinction between federalism on the one hand and decentralisation and deconcentration on the other. Speaking in very general terms, we use the concept of decentralisation with regard to competences that are transferred from the higher entity to organs of the sub-entities that form part of the first entity. This first, larger entity keeps the administrative supervision over the decisions the sub-entity can take in an autonomous way. In the case of deconcentration, the competence remains with the higher unit and is exercised in its name by a sub-unit (under the hierarchical control of the higher unit). More about these concepts later.

The social security schemes of a federation and those of the federated entities, function in the same way as those of every other state; hence their operations can also involve things like functional and territorial decentralisation or 'deconcentration' of competences. Thus within a federation and within a federated state, some competences may be decentralised or deconcentrated.

In some countries, it will be the ministry proper that deals with the collection of contributions and the distribution of social security benefits. But these operations do not generally take place at the central level. At the very least, the ministry will use its field organisations that may or may not be spread across the country (external and internal 'deconcentration'). Most of the time, however, one will go a step further than 'deconcentration': administration will be decentralised into functionally and/or territorially decentralised administrative bodies. We will first focus on functional decentralisation and subsequently on territorial decentralisation. Bear in mind, to begin with, that both forms are often combined and that functionally or territorially decentralised administrative bodies can also comprise the 'deconcentration' of competences.

Functional decentralisation implies that competences are being transferred to specialised or non-specialised public bodies, to semi-public bodies and to profit or non-profit private bodies.

Territorial decentralisation implies that the (more) central authorities delegate some competence with regard to the administration of social security to the actors located at the subdivision level. The central ministry of social affairs may thus delegate certain tasks to bodies at the regional or municipal level. As a matter of fact, local bodies will often be called upon to administer social assistance schemes at the local level. The functionally decentralised bodies too can sometimes decide not to confine themselves to a mere deconcentration and to proceed to territorial decentralisation. It goes without saying that functional decentralisation of territorially decentralised forms of competence is possible as well.

All territorially and functionally decentralised administrative bodies operate by definition under the supervision of the authorities whose competences have been delegated to them. Those competences can often be elaborate. The management of resources, the determination of the rights and duties of all parties involved, the

payment of benefits, enforcement and the like: these can all be part of the decentralised tasks. Both bodies of functional and territorial decentralisation are primarily concerned with clear administrative tasks. Sometimes, however, they will also have been given their own competences by the legislator, with regard to advising higher authorities for instance, or on the subject of administrative regulation. What is more, they are in some cases entrusted with the financial responsibility for the social security scheme they administer. In other words, they are financially responsible for part of the costs (or profits) of the tasks delegated to them.

The notion of decentralisation itself could do with some further clarification. Though it applies to functional decentralisation as well, this clarification is particularly necessary to gain a better understanding of the notion of territorial decentralisation. Indeed, a decentralised administrative structure differs from a federalised administration of the social security system. When social security competences are distributed federally, the constitution itself endows the bodies of the federation and the bodies of the constituent states with competences of their own. Each level has its own sovereignty within its own constitutional bounds. In the case of decentralisation, however, only a (central) level of competence will be discerned explicitly or implicitly by the constitution, whereas the legislator or administrative regulator has passed on, delegated, the exercise of certain forms of competence to territorially or functionally decentralised bodies. There is, in principle, nothing that could preclude the central authority from resuming its competence. In any case, the central government will continue to supervise the decentralised agency. In a federal structure, on the other hand, the competence adjudicated by the constitution to the constituent states cannot be reclaimed by the federation. As such, the federal government cannot check the actions of the constituent states in the execution of their competences. With this distinction elucidated, one can understand why we have only mentioned federalism in the territorial sense so far, whereas both a territorial and a functional dimension have been distinguished with regard to decentralisation. For as far as we know, no constitutional order has ever adjudicated proper forms of competence to a functionally defined social security body, nor has such a body thus been withdrawn from the authority of the legislative power. Functional federalism, so it seems, is an impossibility – at least as far as social security is concerned. Indeed, in the past we examined the possibility of developing a concept of functional federalism in relation to social security, but came to the conclusion that such a concept conflicts with the evident importance of social security in general policy development in a democratic society.[1]

Let me finally add some words about the notion of 'devolution' which is particularly used in the very specific context of British constitutional thinking. As we know, the United Kingdom lacks a written constitution; this does not mean the

1. Cf. our study: Pieters 2009.

United Kingdom does not have a constitution, but it is of a more complex character than the written constitutions of the other states. The supremacy of the Houses of Parliament, or Westminster, means that even when competences are given to or recognised as belonging to the Nations, Scotland and Wales, this is first and foremost done through Acts passed by Parliament in the Palace of Westminster. They label such transfer of competence 'devolution'. As we consider this devolution to be part of the written constitutional framework, we see it as a very specific form of 'federalism', although the notion would probably be rejected in London and perhaps also in Edinburgh. Yet on the other hand we cannot reduce the British devolution to a form of decentralisation, as this would neglect the sovereignty of the Nations to exercise the devolved powers. Anyhow, we shall include the United Kingdom in our study dealing with social security, knowing that this country presents constitutional features which are difficult to classify in a comparative way. In the rest of this study we will not use the notion of devolution.

2 Social security competences

The present study deals with social security. We understand by social security all arrangements aimed at forming solidarity with people who no longer earn an income from paid labour (or who are likely to lose such income) or who face specific costs as a result of the manifestation of a recognised social risk[2]. In fact, we will refer mainly to the social risks described in Convention n°102 of the ILO and to benefits consisting of a cash transfer. Except for healthcare and care, we will not include social services in the scope of our study.

When categorising the social risks we find that the social risk to be covered by the social security arrangement may consist of a lost income, specific costs or a more general state of need. In the first case we speak of income replacement schemes for old age, survivorship, work incapacity and unemployment; in the second of cost compensation schemes for healthcare and care or to meet the burden of a family. These income replacements or cost compensation schemes can be described either in terms of social insurance or social assistance. A general lack of means is dealt with by social assistance.

In this study we examine the distribution of competences between the federal state and the federated entities in a number of countries: five EU countries, Belgium, Spain, Italy, Germany and Great Britain; four industrialised states outside the EU, Switzerland, the United States of America, Canada and Australia; and four emerging economies, the BRIC countries Brazil, Russia, China and India. Let us observe again that some of these states might object to being labelled as 'federal' like e.g. the United Kingdom or even Spain. Yet they all correspond to the broader definition of federalism mentioned above.

2. Cf. the chapter on the concept of social security in Pieters 2006, 1-8.

It would be wrong to think that the constitutions of these states assign 'the' competence with regard to social security to one level, the federal or federated level. In fact, we have to distinguish between the various schemes that form a social security system and between the various functions that have to be performed in relation to these social security schemes:

- Who is competent to establish social security rules (normative function)?
- Who is competent to administer the social security schemes (administrative function)?
- Who is competent to resolve social security disputes (judicial function)?
- Who is in charge of financing the social security schemes (financing function)?

Let us explore each of these functions further.

The normative function seems rather clear: who is in charge of drafting social security legislation? to answer this question however, a further distinction will have to be made between the competence to establish the fundamental rules of the social security system, the basic framework and basic rights and duties, on the one hand, and the competence to regulate the specificities of the social security scheme in question within this framework. In some countries we will find that the normative function is assigned in its entirety to one level, whereas in others the federal level will be competent to establish the fundamental rules, the federated entity legislating in detail.

The administrative function basically includes the competence to raise the funds (collecting function), to administer the funds and to spend the funds (distributive function). These administrative functions have to be clearly distinguished from the financing as such. Because a level is competent with regard to administering the scheme in its collecting or distributing function does not mean it is also responsible for the financing of the scheme.

We will not address the judicial function in this study, as the level at which disputes are resolved usually depends much more on the overall set-up of the judiciary in the states. Having said this, we find that disputes are usually resolved at the level, federal or federated, that is competent with regard to the subject matter of the dispute.

National constitutional provisions may assign the normative, administrative or financing function of social security or a particular social security scheme to the federal or to the federated level. Sometimes this may be done in a more generic way, giving e.g. competence to deal with 'all care for persons and families' or to deal with 'the protection of the workers'. It may also be that the competence is not defined by the subject matter, the scheme of social insurance or social assistance, but rather by the goal to be attained. The competence may than regard drafting legislation to promote the free movement of persons (as e.g. in the European Union) or to incur expenses for the benefit of the general welfare of the federation

(cf. US constitution). This description of competence based on the purpose of the action is not without problems when trying to achieve a clear distribution of powers between the various layers of a state (or within the European Union).
The assignment of competence may be explicit or implied. The explicit assignment of competence may be exclusive or concurring. In the case of exclusive competence the competence is assigned to one and only one level, whether this level exercises its competence or not. If competences are assigned in a concurring way, both the federal and federated level can take action. If both levels take action that is conflicting, one level might have precedence over the other. This is usually the federal level overruling the federated level, but exceptionally it may be the opposite. In other cases the mere fact that one level starts to exercise its competence, might out rule the possibility of the other exercising its competence, even if this would be in a non-conflicting way. Exclusive and concurring powers may in practice come very close to each other, e.g. when the competence to set the basic rules is assigned to the federal level and other legislative power is assigned to the federated level.
As mentioned above, the assignment of competence may also be implied. For instance the federal or the federated level may be recognised as competent because the general competence rests with it and no explicit assignment of competence to the other level has taken place.

3 Distribution of social security competences in a number of federal states

In 2014 a book in the Dutch language 'Sociale Zekerheid in alle staten' (social security in all states) was published, in which I examined the distribution of competences in relation to social security, in Belgium, in the European Union and in a number of selected states, in more detail (Pieters 2014). In this English language article, I would like to share the most salient conclusions made then, which are still valid today.

The reader must be aware from the outset that the overview contains some generalisations and simplifications. Let us therefore start with a *caveat:* when examining the states under review more closely it appears that not all is what it seems; what you see is not always what you get! First, the names: the Swiss Confederation, for instance, is not a confederation, but a federal state. More important for us: the assignment of a competence to a certain level (federation, state) does not necessarily tell us something about the real policy autonomy of that level. In other words, we meet centralised states, such as the People's Republic of China, where the normative competence with regard to social security is kept central, but where in practice the application of these norms may differ from city to city and even more between cities and countryside. The opposite is also possible: we find federal states where social security competences are vested with the federated entities, but where

these entities exercise their competences in a near identical way, in order, for instance, to meet federal standards to qualify for federal subsidies. The United States is an example of this. The formal competence rules may also be disturbed by the delegation of certain competences of and by the federation to the federated entities, the federal level remaining, however, formally competent and thus always able to withdraw the delegated competence, as we can observe in Russia. Here again an example to the contrary can also be given: federated entities may decide to exercise their powers jointly or to harmonise how they exercise these powers, as is the case in Canada or Austria. The distribution of competences between the federal state and the federated entities also presents particularities when only two (large) federated entities coexist in one federal state, as any solidarity or conflict between the federation and a federated entity automatically also affects the relationship between the two major federated entities, as we can observe in Belgium.
Our study also teaches us that the distribution of competences in relation to social security is usually characterised by a high degree of complexity. This may be a direct consequence of the distinction between the competence to set the fundamental norms, to legislate, to administer and to finance. Functional competence attribution, i.e. giving a wide ranging competence to reach a certain goal, may make the distribution of competences even more complex. This can be seen in the United States ('taxing and spending power to the benefit of the welfare of the United States') or indeed the European Union (free movement of persons, services, etc.)

Let us first analyse our findings per cluster of countries, then per cluster of risks, before we venture to give some more general conclusions.

Let us also observe the following in relation to the tables below. The qualifications are of a general nature, allowing for exceptions. They are simplifications, in order to allow for a more general overview and comments. The qualifications were made in relation to the general system (applicable to the whole population, all the workers or all the wage earners). Civil servants were left aside. It has to be observed that in many federal countries, competences in relation to the social security of civil servants will be vested at the same level as employment (i.e. federation or federated entity).
Great Britain refers to England, Wales and Scotland; devolution is measured with respect to Scotland. Northern Ireland, the other component of the United Kingdom, is in principle completely autonomous as far as its social security is concerned, although many arrangements are similar to those applying in England.

We will use the following abbreviations and codes:
Green: competence at federal/central level
Red: competence at federated entity level
Yellow: concurring competence, federal and federated entity levels, with priority for federal level
Yellow with *: concurring competence, federal and federated entity levels, with priority for federated entity level
Blue: both federal and federated entity are competent, alongside each other

A bar (/) of a colour other than the background, means that although in theory the background is valid, in practice the colour of the bar (/) prevails
A 'P' means the competence to set the basic norms, fundamental principles, as opposed to the competence to regulate in general.

OA&S: old age and survivorship
UB: unemployment (benefits)
WI: work incapacity
LA&PD: labour accidents and professional diseases
HC&C: care and long-term Care
FA: family (allowances)
SA: social assistance
N: regulatory power (norms)
A: administration of social security
F: financing of social security schemes

If we look first at the European Union countries, we get the following picture.

	OA&S			UB			WI			LA&PD			HC&C			FA			SA		
	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F
Belgium																					
Spain	ℙ			ℙ			ℙ			ℙ			ℙ			ℙ					
Italy													ℙ						ℙ		
Germany																					
Gr Britain																					

We can see a clear dominance of the federal level, which is mostly exclusively competent; sometimes the competence is shared, but with the federal level has priority. This priority is exercised, so usually the federal level is competent with regard to the regulation, the administration and the financing if the schemes. When some power is allocated to the federated entity level, this usually regards executive norms and administration, but even then we often see that this competence is in practice overruled by the federal level. Exceptions appear mainly with regard to the risks of healthcare, social assistance and also family allowances. We will discuss these exceptions when dealing with these risks.

If we consider four industrialised free market countries outside the European Union, the following picture appears.

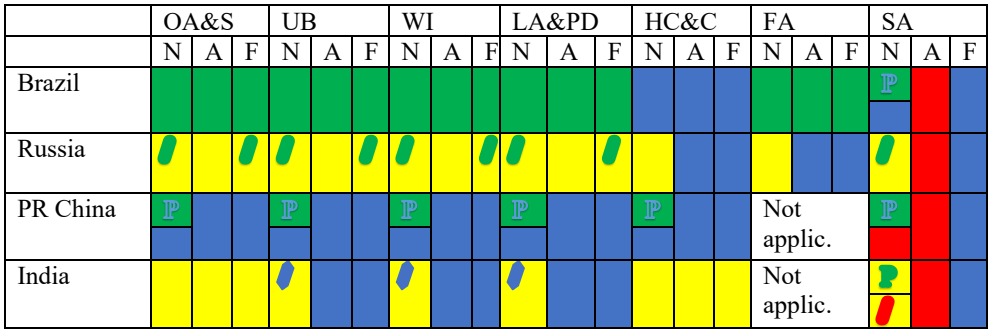
	OA&S			UB			WI			LA&PD			HC&C			FA			SA		
	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F
Switzerland																					
USA																					
Canada	*	*	*																		
Australia																					

Here we also encounter dominance at federal level. Compared with the EU countries, the federal competence is more often not exclusive, but derives from a priority of the federal level in the case of concurring powers or even from a juxtaposition of powers. We also observe that the administration is often shared between the federal and the federated level, whereas the competence to set the norms and the financing remain federal competences.

The Canadian case is remarkable: here we find concurring powers with priority given to the federated level, which is very exceptional. However, in practice this priority does not fully translate: except for Québec, the provinces have agreed to exercise the competences jointly.

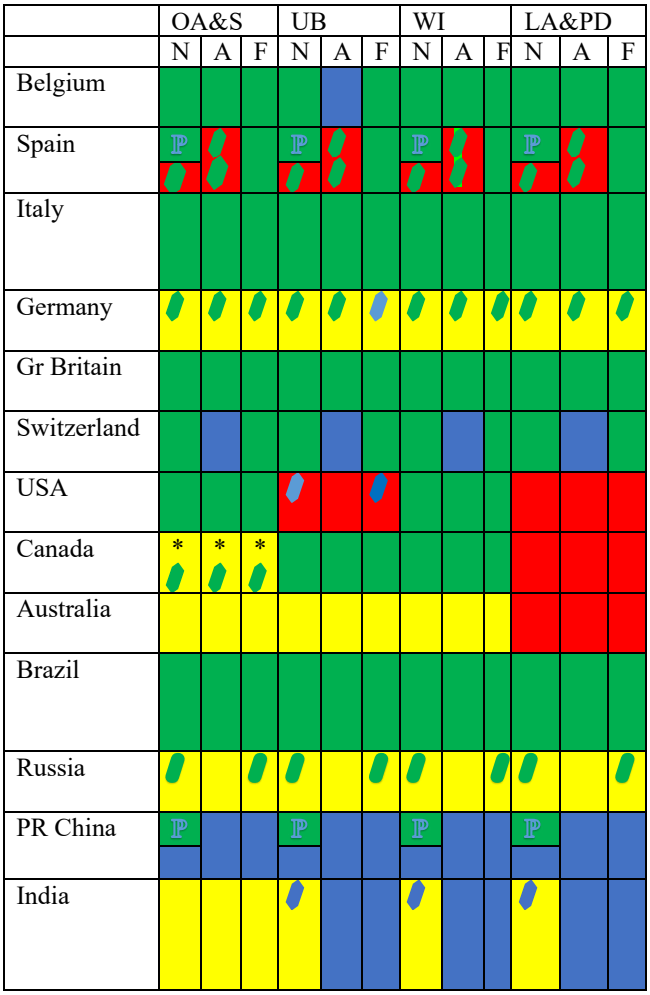
Another remarkable feature is the exclusive competence of the federated entities as far as the labour accidents and the professional diseases schemes are concerned. This has, however, to be understood in connection with the powers of the federated entities in relation to private insurance. In reality the professional risks are indeed covered by private insurance companies.

Looking at the BRIC countries, we get the following picture:



Here the dominant picture is that of a juxtaposition of competences: both the federal level and the federated entities level being active in social protection.
It is also striking that in the BRIC countries the competences for setting the norms, for the administration and the financing are usually set at the same level.

It is of course also possible to group the results in a different way, i.e. by group of social risks. We first look at the income replacement schemes for old age, survivorship, unemployment, work incapacity and professional risks, labour accidents and professional diseases.



As far as the income replacement benefits are concerned these are most often dealt with at federal level, be it exclusively or in concurring power with precedence for the federal level. This federal power usually includes the normative, the administrative and the financing competences.

The family allowances present a category of their own; the following picture emerges.

		BE	SP	IT	GE R	GB	SWI	US A	CN D	AU S	BR	RU	PR C	IND
FA	N		ℙ										Not appl ic.	Not appl ic.
	A													
	F													

As far as family benefits are concerned, a juxtaposition of powers dominates: both the federal level and the federated entities level are active in this area. If this is not the case, the competence might be at federal level (exclusively or concurring with precedence of the federal level) or exclusively at the federated level.

Healthcare and care are the next category of benefits to be examined.

		BE	SP	IT	GE R	GB	SWI	US A	CN D	AU S	BR	RU	PR C	IND
HC & C	N		ℙ	ℙ									ℙ	
	A													
	F													

As far as healthcare and care are concerned we observe that the federated entities are active in most countries, be it exclusively or in juxtaposition with the federal level. Exclusive power for the federal level is rather exceptional.

Finally we should have a look at social assistance benefit schemes.

		BE	SP	IT	GE R	GB	SWI	US A	CN D	AU S	BR	RU	PR C	IND
HC & C	N			ℙ							ℙ		ℙ	ℙ
	A													
	F													

The federated level has a clear dominance in the area of social assistance, with often exclusive powers in the area of administration. As far as the financing is concerned we most often see a joint effort by the federal level and the federated enti-

ties. In order to keep a certain unity in the country to guarantee all a decent life, we quite often observe a federal competence with regard to setting the fundamental norms.

If we show the whole picture, the following colourful table emerges:

	OA&S			UB			WI			LA&PD			HC&C			FA			SA		
	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F
Belgium																					
Spain	P			P			P			P			P			P					
Italy													P						P		
Germany																					
Gr Britain																					
Switzerland																					
USA																					
Canada	*	*	*																		
Australia																					
Brazil																			P		
Russia																					
PR China	P			P			P			P			P			Not applic.			P		
India																Not applic.			P		

We will not repeat all the observations we have made when commenting on the separate tables. Let us simply add some more and come to some general conclusions.

What we have not yet pointed out is that the incorporation or not of social (security) fundamental rights in the national constitution does not impact the distribution of competences in the countries concerned. This should not surprise us as fundamental human rights and thus also social fundamental rights to benefits are written from the perspective of the person benefitting from these rights; who has to respect these rights and provide the corresponding benefits is indifferent: they

have to be respected or provided, by whom depends on how the competences are allocated under the constitution.
Sometimes the competence to establish the fundamental principles of the social security system is given to the central state, while the federated entities are competent with regard to establishing the non-fundamental rules (as is the case in Spain). Sometimes a distinction is made between the normative competence, invested in the federal state and the administration, possibly including executive norms, entrusted to the federated states, as is the case in Switzerland or Russia. Needless to say, in both cases the distribution of powers between federation and federated entities may be difficult to define: what is fundamental and what not? Where does the normative stop and the administrative start?

When we look at the various risks generally speaking we can establish that social security is to a large extent still a federal matter in many countries, yet with some identifiable exceptions. The federated states will often be competent in the area of social assistance and welfare, care and healthcare. Nearly all the European states examined and Canada illustrate this. A second group of exceptions to the federal prevalence in social security constitutes family benefits, including benefits for studying: Belgium, Germany, Switzerland and Canada provide examples of this. Federated entities will also be competent for labour accidents and professional disease in the non-European Anglo-Saxon countries we examined; yet this is mainly to be explained by the competence of the federated entities to regulate private insurance. Finally, federated entities may have extensive competences to regulate, administer and finance social security schemes applying to their own civil servants, as we found in India and Brazil.

Allow me at the end of this presentation to leave for a while the boundaries of this study to reflect on the European Union. If we can consider that, at least in the eyes of its most fervent supporters, the European Union has the vocation to resemble a federal entity if not to become a federal state itself, it would be logical that the European Union would already now tend to be more active in those areas of social security where typically federal states are competent, leaving more room to the member states in those areas where typically federated entities are competent. Do we recognise this logic in the current involvement of the European Union in social security? The European Treaties still proclaim that social security is a national competence and although the ambition to construct a 'social Europe' remains, the EU involvement in social security is still very much limited to coordinating the national social security systems and to imposing equal treatment of men and women on the national social security systems. EU intrusions into the national competence with regard to social security proceed rather from the functional competences of the European Union, such as guaranteeing free movement of persons, workers, services etc. Yet the remarkable thing is that those areas which in a typical

federal state remain at the federated entities level, such as healthcare and care seem to have been impacted most by direct EU intrusion; whereas the typically federal income replacement benefits have to a large extent escaped direct EU intrusion. This apparent or real contradiction is certainly worth exploring in a following study.

Sharing power with employers and employees: a tried and proven form of functional decentralisation in Europe

Ulrich Becker

1 Introduction

1. Functional decentralisation is used for different reasons and takes on very different forms. A political reason to implement it may be the need for a division of powers and the strengthening of democracy, a utilitarian reason may be to enhance efficiency, and a normative reason may be subsidiarity. It is clear that the specific form of decentralisation to be selected should reflect the purpose it will serve.
Social security or, to put it more precisely, social insurance, has a specific form of functional decentralisation. This is characterised by the existence of separate administrative authorities and by the participation of employers and employees in the running of these authorities. This type of decentralisation will be termed 'social self-government' although self-government is an open and somewhat imprecise term which may be used to describe very different types of organisational autonomy. From a systematic perspective, such autonomy may also be called 'devolution'.[1] Devolution generally means that specific functions are devolved to (more or less) autonomous[2] administrative entities,[3] which is sometimes described as a transferral of authority for decision-making and management,[4] as well as at least sometimes for financing. Yet, talking about transferral means taking a top-down

1. As it is often used in the context of UK-specific federalism, see Harlow and Rawlings 2009, 87 et. seq., and Pilkington 2002. See for the open term 'federations' Hughes 2017, 198, 199 et seq.
2. See for relations between devolution and autonomy in a comparative perspective Agranoff 2004, 26 et seq.
3. Generally speaking, the term can also be used in order to describe and analyse the role of local communities, see for example in the context with US-American welfare policies Soss et al. 2008, 536 et seq.
4. See in the context of decentralisation as a basic concept Von Andreae 2005, 25; for the differentiation between 'executive devolution', 'legislative devolution' and 'administrative devolution' Pilkington 2002, 9 et seq.

perspective,[5] and if we look at it from the bottom up, then it might also be seen as a specific way to regulate and govern parts and functions of societies.

2. In order to understand social self-government, one should start from the bottom up perspective, although in reality the relations between the different levels of government are always closely intertwined, and public authority always, and without regard to its organisational architecture, needs to be legitimised. In a certain way, one may distinguish a societal bottom-up and a legal top-down perspective, as every social insurance institution needs a founding legal act of Parliament in order to come into existence. The following observations will reflect this background and try to explain how social self-government works. These observations are made in two steps. The first step (2.) provides a short overview of specificities and forms of social self-government. The second step (3.) is devoted to explaining how self-governance works in German social security. This focus on Germany offers a rather restricted perspective, but there are different reasons for taking it. First, social self-governance is one of the cornerstones of Bismarckian social insurance; it was 'invented' in Germany and has thus had a long-standing tradition there. Second, within a restricted frame of space and time, it is not possible to deal with a multitude of jurisdictions without merely scratching the surface. Nevertheless, the first section also gives account of some general comparative findings, and includes a European-wide overview (2.2).

2 Social self-government as a specific form of functional decentralisation: features and appearances

2.1 Starting points

2.1.1 Historical background

Social self-government started in Germany with Bismarck's legislation on social insurance. Although the first statute that came into force was the Law on Health Insurance for Workers (Gesetz betreffend die Krankenversicherung der Arbeiter[6]), the discussions and proposals started in the field of occupational accidents (Unfallversicherungsgesetz[7]). It was not only disputed whether this insurance should take the form of private insurance; but also the organisation and the financial sources of social insurance were under discussion (Vogel 1951, 152 et seq.). In the end, it was decided to install public authorities that should be administered by those who were affected by the new systems. Thus social self-government came into exis-

5. See for 'autonomised administrative authorities' or 'para-governmental organisations – PGOs' Hood and Schuppert 1988.
6. Gesetz betreffend die Krankenversicherung der Arbeiter of 15 June 1883, RGBl. 1883, 73.
7. Unfallversicherungsgesetz of 6. July 1884, RGBl. 1884, 69.

tence. And to this day it is still one of the prominent features of social insurance in Germany.

What was the reason for choosing this form of administrative structure? In a famous communication of the Emperor in 1881, which was of slightly more purport than a Whitebook would be nowadays, and which rather served as a public explanatory report, we can find the answer: '*Der engere Anschluss an die realen Kräfte dieses Volkslebens und das Zusammenfassen der letzteren in der Form korporativer Genossenschaften unter staatlichem Schutz und staatlicher Förderung werden, wie Wir hoffen, die Lösung auch von Aufgaben möglich machen, denen die Staatsgewalt allein in gleichem Umfange nicht gewachsen sein würde*.'[8] So, the idea was to make use of the 'real forces of people' and to effect a consolidation of these forces in the form of 'corporate cooperatives under the protection and the support of the state' – with the hope that this would make a 'solution of tasks possible where government authority on its own would be insufficient to cope to the same extent'. By mentioning 'cooperatives', the government made reference to a model of private associations (*Genossenschaften*) which served as a sort of blueprint for what *Otto von Gierke* famously called 'social oil',[9] an ingredient of German private law which was supposed to help smoothen the hardships of private autonomy (Hofer 2001).

Although the social insurance legislation was aimed at providing an answer to urgent social risks incurred by the workforce, the Social Democrats had some reasons to complain about it. They feared that they would lose their revolutionary power with its introduction, and in particular social self-governance was seen as an insufficient replacement for this loss. They named social insurance a 'Linsengericht', in the metaphorical sense of a simple and cheap meal, which came instead of the much more highly acclaimed right to work and subsistence (Ayaß 2010, 17 et seq.). We know that combating socialism was indeed one of the goals of German social insurance (Zöllner 1980, 24 et seq.),[10] and *Bismarck* explicitly said in a speech

8. 'Closer connection with the real forces of people and consolidation of the latter in the form of corporate cooperatives under state protection and state support will, as we hope, also make possible the solution of tasks which state power alone would not be able to resolve.' Verhandlungen des Reichstags [Debates of the Reichstag] 1881, Opening Session of 17 November 1881, RT Prot. 1881, pp. 1, 2 (www.reichstagsprotokolle.de, last access on 22 October 2018).
9. Gierke 1889, 13: 'Tropfen sozialistischen Öls'. *Gierke* also used the term 'social law' ('Sozialrecht'), understood as law concerning the relations between individuals as bearers of human will ('Recht, das die Beziehungen der menschlichen Willensträger als Einzelwesen zueinander in Beziehung setzt'), Gierke 1895, 26.
10. For Bismarck's idea of a 'state socialism' see only Tennstedt 2014, 73, 80 et seq.

to the Parliament that it was only the fear of the Social Democrats that had allowed for – as he put it – the still only mediocre progress in social reforms.[11]

2.1.2 Functions and organisational pathways

From a political science perspective, social self-government is a corporatist approach. In a famous article, *Philippe Schmitter* described corporatism as 'a system of interest and/or attitude representation, a particular modal or ideal-typical institutional arrangement for linking the associationally organized interests of civil society with the decisional structures of the state' (Schmitter 1974, 85-86).

From a legal point of view, the most prominent feature of social self-government is the fact that new legal entities are created, each of them founded by a particular act of Parliament. These entities gain their own legal personality, and they are vested with public powers in order to become part of the public administration. As respective entities are based on persons representing particular interests, they come in the form of public corporations ('Körperschaften des öffentlichen Rechts') (see for a 'classical' overview Wolff and Bachof 1976, 167 et seq.). If it is called 'neo-corporatism' today, this is due to fascist politics that misused corporatism and tried to merge community and society as a whole by destroying individual freedoms and replacing private associations with public corporations on a wide scale (see for Facist Italy Williamson 1985, 83 et seq., and for 'authoritarian-licenced corportism' Williamson 1985, 126 et seq.).

In substance, social self-government has to be seen as a publification of societal activities and interests. This was the essence of the above-cited communication of the Emperor, i.e. the *Kaiserliche Botschaft*, and it is still the most important meaning today. Societal or 'associationally' organised interests are being used in order to pursue public interests – which of course changes their substance and puts the political community at least partly in a position in which it can decide on how to make use of it (see for a critical comparative assessment of different arrangements of the welfare states and their openness to societal interests Bode 2004).

Of course, it is also possible to pursue a (neo-)corporatist approach in a different way (cf. Schmitter 1982, 259 et seq., see for overlaps between different arrangements in policy processes in general Jordan 1981, 95 et seq.), namely by regulating associations without changing their legal form and leaving them to the sphere of

11. *'Wenn es keine Sozialdemokratie gäbe, und wenn nicht eine Menge Leute sich vor ihr fürchteten, würden die mäßigen Fortschritte, die wir überhaupt in der Sozialreform bisher gemacht haben, auch noch nicht existieren, und insofern ist die Furcht vor der Sozialdemokratie in Bezug auf denjenigen, der sonst kein Herz für seine armen Mitbürger hat, ein ganz nützliches Element'* [transl.: If there were no social democracy, and if a lot of people were not afraid of it, the modest progress we have made at all in social reform so far would not yet exist, and thus the fear of social democracy, with regard to those who otherwise have no heart for their poor fellow citizens, is quite a useful element.], in: Verhandlungen des Reichstags [Debates of the Reichstag] 1884, Third Session of 24 November 1884, RT Prot. 1884/85, p. 25. (www.reichstagsprotokolle.de/Blatt3_k6_bsb00018449_00081.html, last access on 19 November 2018).

society. This approach can be found in many states in order to structure industrial relations by way of collective agreements (see e.g. Atkinson and Coleman 1985, 22 et seq.), depending on how far they intervene with collective bargaining.[12] And it is what political scientists call a 'societal corporatism', which they hold to be much more modern than the traditional 'authoritarian' one (see for different forms of corporatism in industrial relations Crouch 2006, 46, 49 et seq.), based on compulsory membership and public corporations – exactly the features that still dominate today's social self-government.

2.1.3 Administration and provision of benefits

The last point leads to a remark on the distinction between self-government and the regulation of the actual provision of social benefits. As most benefits in kind are not provided directly by the social insurance administration but by legally independent private actors, arrangements between these actors and the administrative authorities are needed (see for that and the 'delivery triangle' Becker 2013, 497, 502 with further references). In Germany, this is, again, organised in line with a corporatist approach (for the underlying structures and principles Becker et al 2011, 323 et seq., Becker et al. 2012, 1 et seq., 102 et seq.). At the same time, collective action within social security schemes (so-called *gemeinsame Selbstverwaltung*) serves as an instrument for concretising social rights which are based on acts of Parliament but are necessarily open[13] as the Parliament has neither the time nor the knowledge to concretise these rights.[14]

The best example for this approach can be found in the German Statutory Health Care Insurance (SHI). A very complicated system of statutes and collective bargaining is applied in order to regulate the provision of benefits and convert the statutory rights to medical treatment into more concrete forms. There is even a

12. In Germany, collective bargaining is protected as an individual and collective right under Art. 9 par. 3 of the Basic Law [Grundgesetz]. According to the case law of the German Federal Constitutional Court, the (social) state has the obligation to legally frame the 'collectivized private autonomy', see lastly dec. of 11 July 2017, 1 BvR 1571/15, 1 BvR 1588/15, 1 BvR 2883/15, 1 BvR 1043/16, 1 BvR 1477/16 (Tarifeinheitsgesetz), par. 145 et seq., BVerfGE [Official Collection of the Decisions of the Federal Constitutional Court] 146, 71-163.
13. See for example s. 28 par. 1 sent. 1 of Social Code Book V on medical treatment: '*Die ärztliche Behandlung umfaßt die Tätigkeit des Arztes, die zur Verhütung, Früherkennung und Behandlung von Krankheiten nach den Regeln der ärztlichen Kunst ausreichend und zweckmäßig ist.*' [transl.: Medical treatment includes the activity of a doctor which is sufficient and appropriate for the prevention, early diagnosis and treatment of diseases in accordance with the rules of the medical profession.] No further explanation is given in the chapter on the rights of the insured (s. 11 to 68 of Social Code Book V). Although the Federal Social Court has changed its case law and does not speak of a 'frame right' anymore, it leaves no doubt that the right to medical treatment according to s. 27 par. 1 in conjunction with s. 28 par. 1 Social Code Book V underlies the conditions laid down by collective actions under s. 69 et seq of Social Code Book V, see dec. of 2 September 2014, B 1 KR 3/13 R, par. 14.
14. In many other countries, this task of putting an open individual right into concrete (and then enforceable) shape is either accomplished by statutory instruments, often based on decisions of specialised committees under the supervision of a governmental department.

very powerful new actor in the so-called 'joint self-government', the Joint Federal Committee. This is mostly made up of representatives of sickness funds as well as representatives of physicians and hospitals admitted to the system. The Committee has the power to enact legally binding provisions comparable to statutory instruments. At the same time, its democratic legitimisation is highly disputed[15] as those provisions also apply to third parties such as pharmaceutical enterprises.

2.2 Comparative perspective: social self-government in EU member states

2.2.1 General remarks

Given not only the historical background but the function of social self-government, we can expect to find the respective administrative structures foremost in social insurance schemes. This assumption is based on a typology of social benefits systems which leads to four different categories, based on the method of financing and the specific social purposes concerned (Becker 1996, 83 et seq.). It can be summarised in two and a half hypotheses:

1. Contributions matter because owing (and paying) contributions expresses, and actually provides, the basis for a particular responsibility for the social benefits without discussing whether this responsibility is based on good reasons or not.[16] This can be mirrored by a responsibility for running the system. From an economic perspective, social security contributions might be part of wages and regarded as specific 'taxes' at the same time; from a legal perspective, they have to be qualified as part of a mutual legal relationship, and contributions are the payment for benefits even if, as is the rule, actual provision of those benefits does not depend on whether contributions are being paid or not.
2. The more universal a social insurance system is, the less visible the responsibility of contributors and insured persons becomes. To be clear: this only gives some indication and marks a certain tendency, but does not mean that a universal contributory scheme could not be organised by way of self-government.
3. Of course, tradition matters, and a revolutionary new approach to social security can lead to the creation of new schemes with new administrations. This holds especially true as some expect that universal schemes would lead to more efficiency and lower administrative costs. The size of a given country may also matter. If self-government is a mode of power sharing or division of powers, then it could be assumed that the larger the benefits system, the stronger the need for such a division will be.

15. See for the most recent discussions Federal Constitutional Court of 10 November 2015, 1 BvR 2056/12, par. 22 et seq., BVerfGE 140, 229-240, and Kingreen 2017, 8 et seq.
16. There were and still are discussions on the participation of employers in social self-government, see Schulin 1994, § 6 par. 93.

2.2.2 Some findings

At the start of the 20th century social insurance was a success story – and its growth all over Europe (cf. Alber 1982) was also a very interesting process of legal transplants. Whereas the historical development and its social policy implications are well known (see for example Ritter 1991), an analysis of these transplants from a legal comparative perspective has still to be written.

The search for universality during and after the Second World War led to new social security architectures, and at least in some countries we can observe a movement towards strictly governmental administration, especially in the UK (based on the *Beveridge* Report, Beveridge 1942) and in the Netherlands (based on the *Van Rhijn* Report, cf. van Oorschot 2006). In others, such as in France, it has not had the same impact on the organisational structures as the entities of insurance funds still are representatives of employers' associations and trade unions. Given its specific historical situation, Germany was left untouched by the wave of new social security universality in the 1950s (see Stolleis 2003, 211 et seq.).

The political changes after the Fall of the Wall had some different effects. At least some states went back to their historical roots in their re-organisation of social security, putting in place traditional social insurance schemes again (see Becker 2010, 40, 43 et seq., see further contributions in v. Maydell and Hohnerlein 1993, v. Maydell and Nußberger 2000, see also Götting 1998).

Admittedly, it is hard to say to what extent social self-government and social corporatism exist in Europe today. There is no comprehensive survey. Unfortunately, MISSOC[17] is not of any help as it is totally blind to the organisational aspects: its creators simply do not have any interest in the role of organisation, which leaves a considerable loophole in the whole survey.

2.2.3 A 'Germanist' approach?

The question remains whether social self-government is a 'Germanist' approach anyway. A comparative study on the organisation of social security in Germany, Italy and France showed that most social insurance authorities were established as separate legal entities, either in the form of public or private law (Becker 1996, 444 et seq.). This leads to functional decentralisation in every country under inspection. Yet, it is not easy to identify its specific function (Becker 1996, 466 et seq.). As a rule, decentralisation does not serve as an instrument for differentiation in social benefits. Generally speaking, the substance and level of benefits are regulated by acts of Parliament. The same holds true for the creation of insurance authorities. Nevertheless, there are security systems founded in the societal sphere by way of collective agreement: e.g., the supplementary old age pension insurance for employees in the private sector in France. This became mandatory (*régime complémentaire obligatoire*) through social security legislation (Loi. n. 72-1223 of 29 Decem-

17. See: www.missoc.org (last access on 22 October 2018).

ber 1972, J.O. of 30 December 1979) and today it even forms part of social security coordination within the European Union (see already Reg. 1408/71 Annex IIa H a-c).

In a comparative perspective, my conclusion on the function of social self-government is that it serves two goals: first, the creation of separate social security budgets. Such budgets are distinct from the general state budget, a fact which enhances transparency although it does not completely block relocations of financial means between the separate budgets. Second, autonomous social insurance authorities allow for the participation of representatives of collective bargaining partners in social security administration. What this actually means depends in particular on two factors. One is the question of how the influence of these representatives is balanced with governmental responsibility,[18] especially with regard to the regulation of internal elections, the powers of the respective entities and the supervision through governmental bodies. Another relevant question is the architecture of industrial relations in general and the role which employers' associations and trade unions play in this regard, since this role is, in a way, 'mirrored' in social security organisation. As a consequence, it is necessary to look at the details of social self-government in every jurisdiction – which would require an updated legal comparison. In order to be able to add at least some more information, I will concentrate on the situation in Germany and try to give an overview of how social self-government works there.

3 On the functioning of social self-government: the case of Germany

3.1 Constitutional background: German federalism and equality

a) Self-government also means self-autonomy. In reality however, the powers of self-governed public bodies to regulate their own affairs are very much restricted.[19] This is due to a principle of German constitutional law, the rule of law. It urges, according to the case law of the Federal Constitutional Court, the Parliament to decide on all measures being essential.[20] Essential in this sense means, inter alia, having considerable importance for the enjoyment of constitutionally protected freedoms (see for a critical assessment Schmidt Aßmann 2004, § 26, par. 65). This principle applies without limitations also to 'positive' governmental actions, including the provision of social security (see s. 31 of Social Code Book I).

18. It is not by chance that there was, at an early stage in Germany, a broad discussion on whether social self-government would and could be misused for political indoctrination, see Stier-Somlo 1912, 74 et seq.
19. Which has often been criticised, see Schnapp 2006, 191-203.
20. BVerfGE 47, 46, 79 (sexual education); E 49, 89, 126 et seq. (Kalkar I); E 57, 295, 321 (Saarländisches Rundfunkgesetz).

And it does not become less strict due to the fact that social insurance authorities are self-governed.[21] Rather the opposite is true: since legitimisation through elections within the authorities (in particular personal legitimisation) is regarded as weak and the predominant doctrine in Germany follows a formal approach which puts emphasis on the general elections (see Emde 1991, 452 et seq.; rather narrow and somewhat formalistic Böckenförde 2005, § 34, par. 33 et seq.), all essential questions require a material legitimisation and need to be answered by acts of Parliament. Therefore, room for self-government remains very much restricted.

b) The rule of law and the particularities of German federalism led to very centralised social benefits systems as far as their legal basis is concerned. In Germany, the division of powers between Federation and states does not follow one single set of criteria for all relevant governmental functions – as for example is the case in the USA, where the federation executes its own legislation – but different criteria for legislation on the one hand (Art. 70 et seq. Grundgesetz) and administration on the other (Art. 83 et seq. Grundgesetz). It is therefore the rule that the federation has full powers to lay the legal foundation in a specific area, and that it is the power of the states to apply and implement the federal laws. This rule also holds true for social insurance where the states only have legislative powers if the respective federal laws leave them room to do so (Art. 74 par. 1 No. 12 Grundgesetz in conjunction with Art. 72 par. 1 Grundgesetz).
In practice, such room does not exist.[22] A reason for this might be a German yearning for equality. Germans do not believe in competitive federalism very much, and they certainly would not accept different social rights according to the regions they live in. This general attitude has experienced some modifications as Germany has recently introduced the possibility to vary the wages of civil servants according to the states they work for,[23] yet it is still predominant – and the states' margins of legislative appreciation remain framed by federal constitutional law.[24] Even if local circumstances matter, as is the case when deciding on the amount of social assistance benefits, most factors apply without regional differentiation on the basis of federal laws.[25]

21. Which is, in turn, not protected by the Grundgesetz as such; but see Art. 87 par. 2 Grundgesetz on the organisation of social insurance authorities. Cf. Becker, 2012, § 13 par. 9-11.
22. Because of the detailed rules contained in Social Code Book I, III, IV, V, VI, VII and XI.
23. Law altering the Grundgesetz (Gesetz zur Änderung des Grundgesetzes (Art. 22, 23, 33, 52, 72, 73, 74, 74a, 75, 84, 85, 87c, 91a, 91b, 93, 98, 104a, 104b, 105, 107, 109, 125a, 125b, 125c, 143c) of 28 August 2006, BGBl I p. 2034.
24. See for wages of civil servants and the *Alimentationsprinzip* Art. 33 par. 5 Grundgesetz, and e.g. decision of the Federal Administrative Court of 21 September 2017, 2 C 30/16.
25. Laid down in Social Code Book II and XII and the respective (federal) statutory instruments.

3.2 External organisation of German social security

3.2.1 Different structures according to branches

It is quite remarkable that the external organisation of German social insurance differs greatly from one branch to another. This is an expression of particularities of how the respective systems are constructed and of their specific function (notwithstanding some early critics, see Tennstedt 1975, 522 et seq.).

- Industrial injuries insurance is administered by 'Berufsgenossenschaften'(s. 114 Social Code Book VII and Annex I), public corporations which are, generally speaking, responsible for a specific industrial branch. This structure allows them to combine compensation and rehabilitation with prevention, which has helped to make the insurance scheme a success story – although we can nowadays observe a merging process[26] towards the creation of bigger and therefore more stable entities.
- From its beginning, unemployment insurance has formed part of the employment services in Germany.[27] Due to this combination, it is the only insurance branch which is organised through tripartite governance (s. 371 par. 5 Social Code Book III), and, at the same time, the only one which consists of a federal administration in a proper sense: with one headquarter and a hierarchical net of dependent regional and local offices all over Germany.
- Old age pension insurance was, for historical reasons, organised in two parts: state authorities for the insurance of workers, and a federal authority for the insurance of white-collar employees (Landesversicherungsanstalten und Bundesversicherungsanstalt für Angestellte); the different organisations still exists, but they underwent profound reforms[28] after the two different schemes were merged (s. 125 Social Code Book VI).
- A very particular organisation characterises the SHI. At the beginning, sickness funds were established according to the pre-existing models of privately organised funds. This led to three different types of funds: local funds, enterprise funds and guild funds (see Gesetz betreffend die Krankenversicherung der Arbeiter, fn. 3). So-called supplementary funds came into existence as early as in 1911 as private corporations and were reformed in the 1930s into public corporations.[29] A specific fund was responsible for the administration of miners' insurance. As every fund had its own legal personality, there was a great number of sickness funds, in the early 1990s still amounting to around 1200. As a

26. See Gesetz zur Modernisierung der gesetzlichen Unfallversicherung of 30 October 2008, BGBl. I, p. 2130; for the systematic background, see Becker 2004, 51 et seq.
27. Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung of 16. July 1927, RGBl. I, p. 187; see for the development Peters 1978, 98 et seq.
28. Gesetz zur Organisationsreform in der gesetzlichen Rentenversicherung of 9 December 2004, BGBl. I, p. 3242.
29. 12th Aufbauverordnung of 24 December 1935, RGBl. I, p. 1537, 15th Aufbauverordnung of 1 April 1937, RGBl. I, p. 439.

consequence of their financial autonomy, the level of contributions varied between these funds which led to a major problem with regard to equality.[30] In order to solve this problem, the legislator introduced a – more or less – comprehensive right of the insured persons to choose between the sickness funds. As a result, there is regulated competition between the sickness funds (see for an early analysis Becker 2001, 7 et seq.). This is a unique situation as the funds are – in contrast to the approach that can be found in the Netherlands and Switzerland (for a comparative perspective Becker et al. 2010) – still public corporations and part of the public administration (for reform proposals, see Becker and Schweitzer 2012).

3.2.2 Fragmentation and universality

This picture might give the impression that the overall structure of social security is very fragmented. Taking a closer look, however, this is not the case. What we can observe instead is a growing degree of universality within single insurance branches. In pension insurance, the federal authority has been vested with the competence to coordinate all pension funds since the organisational reform (s. 138 Social Code Book VI). The same coordination function is exercised by a separate umbrella organisation within industrial injuries insurance.[31] Again, the SHI stands out as there are associations both on state level and federal level which come in the form of public law (s. 207 and 217a Social Code Book V). Those associations have the task of putting the above-mentioned 'joint self-government' (see 2.1.3) in place.

3.2.3 New arrangement: Hartz IV and the 'Arbeitsgemeinschaften'

A new hybrid administrative body is the so-called 'Arbeitsgemeinschaften' (working groups), called into life by the famous Hartz IV reform.[32] These new administrative agencies are joint ventures by nature, they unify two partners, the local branches of the federal employment agency on the one hand, and local communities on the other (s. 6 Social Code Book II). The underlying idea was that the administration of the new jobseekers' allowance scheme – which came under the heading 'support and demand' ('fordern und fördern') (following the so-called activation policy, see Eichhorst et al 2008, 17, 18 et seq.) needed a combination of two very different skills, namely good knowledge of the labour market conditions on the one hand and knowledge of the local situation concerning housing and living in general on the other. Only a restricted number of local communities have been assigned to take over the tasks of the employment agency as their own com-

30. See dec. of the Federal Constitutional Court of 8 February 1994, 1 BvR 1237/85, BVerfGE 89, 365, 376 et seq.
31. DGUV (see: www.dguv.de, last access on 22 October 2018).
32. Fourth Law on the Modernisation of Services on the Labour Market (Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt) of 24 December 2003, BGBl. I, p. 2954.

petence.[33] For all other parts of Germany, a very new form of 'mixed' administration has been introduced – remarkably without any clear idea or legal provision on their form or internal structure. In addition, the federal constitution had to be amended[34] as the co-existence of mixed or hybrid agencies had led to a modification of the principle of separated administrative powers of federation and the states.[35]

Without going into further detail, two points merit consideration. It is not by chance that the new administrative joint ventures were established in the field of social assistance. Although the respective present benefits schemes are trying to restrict the individualisation of benefits (for an overview see Becker 2008, 39 et seq.), it is clear that local communities play a strong role in the administration of social assistance, as they also do when it comes to support for children and youth. This is a different approach to functional decentralisation which is worth being studied, as self-governance of local communities plays a prominent role in Germany and is even legally protected by the German constitution (Art. 28 par. 2 of Grundgesetz).

But the Hartz reforms can, at the same time, be regarded as an expression of more complex social policy goals which are part of the so-called activation policies. In order to pursue these goals, traditional social benefits schemes have to become much more coordinated, and this might also lead to new organisational structures and new forms of governance. That the external organisation of social security always has been, and still is based on functional aspects, is an important outcome of the overview given so far. There are certain limits to reforms, as external flexibility can only go as far as is allowed for by the internal structures.

3.3 Internal organisation: self-government in a narrow sense

Whereas the external organisation of social self-government has been undergoing reforms and a certain process of modernisation, its internal organisation (regulated by s. 29 et seq. of Social Code Book IV) has remained more or less untouched. It suffices to highlight two aspects. Every insurance fund has two types of entities (see s. 31 of Social Code Book IV): the first may be called a 'collective body' consisting of elected representatives of employers and the persons insured.[36] Its task is to decide on general questions of general importance and to appoint the members of

33. So-called 'Optionskommunen'; see dec. of the Federal Constitutional Court of 7 October 2014, 2 BvR 1641/1, BVerfGE 137, 108.
34. Art. 91e par. 1 Grundgesetz, introduced through the Act for Amendment of the Grundgesetz (Art. 91e) of 21 July 2010, BGBl. I p. 944.
35. For the prior infringement of the Grundgesetz, see dec. of the Federal Constitutional Court of 20 December 2007, 2 BvR 2433/04, BVerfGE 119, 331.
36. Called *Vertreterversammlung* or *Verwaltungsrat* (for sickness funds).

the second body which is similar to a managerial board (s. 33 of Social Code Book IV). These boards[37] are responsible for the day-to-day activities of the funds.
Elections in a proper sense only take place if there is more than one proposal from each societal group involved, i.e. the employers on the one hand and the persons insured on the other (see s. 44, 46 par. 2 Social Code Book IV). In practice, this is the rare exception. In 2017, elections took place in 2 pension funds out of a total number of 16, and in 5 sickness funds out of a total number of 113.[38] For all other insurance funds, the persons on the proposed list of representatives were elected without further procedure – which comes rather euphemistically under the term 'peaceful election'.[39]
All in all, it becomes very clear that social self-government is dominated by the influence of collective partners, the employers' associations on the one hand and the trade unions on the other.

4 Final observations: weaknesses and strengths of social self-government

4.1 Weaknesses

The last point takes us to the concluding analysis and a first critical remark. Many observers argue that the described structure of self-government has to be regarded as anti-democratic. True, the dominance of collective partners and 'peaceful elections' lead to the conclusion that the influence of the persons insured and personal democratic legitimisation within social security administration are quite weak (very critical Haverkate 1992, 301). Yet, one should not forget that the technicalities of social insurance and a tight legislative framework for the activities of social insurance funds leave little room for political decisions.[40]
It is exactly the last fact which raises another concern and a second point of critique. As there is not much room for manoeuvre and discretion, the margin of appreciation left to self-governed social insurance funds is small, and it even becomes increasingly smaller over time taking into account the tireless activities of the legislator. This is why one may fear a loss of powers and a weakening of the social self-government as such. On the other hand, detailed social security legislation is inevitable. Social rights must not be put at the discretion of administrative authorities. The principle of equality is not only a political priority but a binding

37. Called *Vorstand*. With sickness funds, this Vorstand is a professional board, see s. 31 par. 3a of Social Code Book IV.
38. See www.sozialwahl.de/ergebnisse/gesamtergebnisse-der-sozialwahl-2017 (last access on 10 August 2018).
39. Term used by the Federal Social Court, see lastly dec. of 8 September 2015, B 1 KR 28/14 R, par. 27. 'Friedenswahl ohne Wahlhandlung'.
40. Which is why the option to organise elections may be regarded as a sufficient means of personal legitimisation.

constitutional provision, and it is the responsibility of the legislature to ensure its effectiveness.

4.2 Strengths

But why should complex administrative structures such as social self-government be put in place if they do not serve democracy and individual freedoms? First, there is the argument I have already pointed out in the context of a comparative perspective: by separating social insurance budgets from the general budget, the creation of autonomous bodies helps to guarantee, to a certain degree, the autonomy of social security politics.

Second and much more important: the participation of employers and employees in the administration of social security is the fundament for social partnership. Social self-government serves as a sort of institutional anchor, stressing the responsibility of the most important groups of labour market participants for well-performing social security systems. Possibly, this requires a certain societal background and it might be especially well-suited for a still rather cooperative society such as Germany. Also, possibly, we could live without it. But this would certainly mean losing an institutional backbone of our welfare state.

Part II

Country reports

Devolution and decentralisation in social security: the situation in Austria

Verena Zwinger

1 A general picture of the social security system and the administrative structure

In Austria, the social security system is largely based on the concept of social insurance. On fulfilment of certain preconditions (primarily but not exclusively gainful activity), social insurance becomes mandatory.[1]

The social risks borne by employees, with the exception of unemployment insurance, which is regulated in a separate act,[2] are dealt with in the ASVG[3] (General Social Insurance Act). The same risks are addressed in the GSVG/BSVG/FSVG for certain groups of self-employed workers and in the B-KUVG for civil servants and wage earners. Hence, Austrian social insurance is not only structured according to the risks covered by specific social insurance branches, but also according to the occupations and activities of the insured persons.

The division of legislative and governance competences adds another layer to the complexity of this system. In most cases, however, the specific social security acts for self-employed workers and civil servants repeat or at least refer to the general provisions set out in the ASVG. For this reason we focus below primarily on the ASVG (especially in the second part of this chapter on decentralisation).

In addition to the benefits provided for in the social insurance schemes, there are also care allowances, regulated in the BPGG[4] (Federal Care Allowance Act), other care services provided for by state law, family benefits and finally a safety net of social assistance, which provides for a subsidiary minimum standard to ensure a decent standard of living.

1. The risks sickness, motherhood, occupational accidents and diseases, work incapacity, old age, unemployment and death of the breadwinner are covered and divided into different insurance branches (health care, accident, pension and unemployment insurance).
2. Arbeitslosenversicherungsgesetz 1977 (AlVG), BGBl 1977/609.
3. Allgemeines Sozialversicherungsgesetz – ASVG, BGBl 1955/189 version BGBl 1956/18.
4. Bundespflegegeldgesetz – BPGG, BGBl 1993/110.

2 The state of devolution

2.1 Historical remarks[5]

The first decisive period with regard to the development of a constitution began in 1848 when nationalist movements grew stronger in Austria, culminating in a revolution. Up to this point, Austria had been a multi-ethnic state. Revolutions emerging all over Europe forced the Emperor, Ferdinand I., to establish a general assembly with a view to creating a constitution. However, officially due to illness, the Emperor passed his duties to his successor, Franz Joseph I., who dissolved the general assembly and prolonged the absolutistic reign that had been in place since the time of the French revolution. But absolutism was unpopular in the regions at that time and liberal as well as national movements remained active. These movements weakened the Emperor's position so much that Austria had to be restructured.
The Austrian-Hungarian monarchy, a form of constitutional monarchy, was established in 1860. In the aftermath of the loss of the important battle of Königgrätz in 1866, a compromise with Hungary was made,[6] granting Hungary far-reaching internal political autonomy.
After World War I the prohibition to merge with Germany was laid down in the peace treaty of Saint Germain. As a result, 'German Austria' was transformed into the Republic of Austria. During the time of the First Republic (1919-1933), domestic political divergences accumulated and led to armed conflicts between the paramilitary forces of the Christian Social Party and the Social Democratic Worker's Party of Austria which resulted in a civil war. Following the civil war, the dissolution of the national council marked the beginning of the dictatorship under chancellor Dollfuß.
In 1938, German troops occupied Austria.
After World War II, the democratic Republic of Austria was restored with the constitution passed in 1920. During the allied occupation, every (constitutional) law had to be approved by the Allied Control Council in advance.
The treaty of 15 May 1955 and the declaration of neutrality brought an end to the redrawing of the political map. Currently, we are living in the era of the Second Republic, formally created by the Declaration of Independence in 1945.

2.2 Constitutional setting

The first important constitutional document in Austria was the so-called December Constitution (1867). This contained five 'basic laws' (Staatsgrundgesetze) and applied for the Austrian part of the monarchy only. On adopting the December

5. Cf. Hofmeister 1981.
6. So called 'Ausgleich' 1867.

Constitution, parliament was included in the legislative process and the powers of the monarch were therefore restricted.
After World War I and the disintegration of the monarchy in 1918, a provisional constitution was put in place; the B-VG[7] (Federal Constitution Act) was adopted in 1920. This act was drafted by the Constituent Assembly (an elected body) and is a milestone in the first democratic constitution in Austria which is still effective to this day. One of the key actors in the process of constitution building was Hans Kelsen, who had to balance the diverging interests of both political camps in a federalist or centralistic state structure.[8]
The articles on the allocation of competences were inserted during the first amendment of the B-VG, in 1925. Even more far-fetching than the first was the second amendment in 1929, which in particular strengthened the position of the president.
Following the civil war, chancellor Dollfuß took over and imposed the authoritarian May-Constitution on the people in 1934 which delegated all the powers parliament used to have to the government (Austrofacism).
After World War II, the B-VG 1920 in the version of 1929 entered back into force. Legally, this was achieved through the V-ÜG[9] (Constitutional Transition Act).
Since then, the B-VG has been subject to a number of amendments, one of which included the adoption of the European Convention on Human Rights, another concerned Austria's membership of the European Union (1995). The latest major amendment regarded restructuring the administrative jurisdiction (2014).

2.3 The division of competences between the layers of government

2.3.1 State structure

In 1920, when the B-VG was adopted, the main disagreement between the political forces was how to separate the powers between the federation and the nine constituent states. While the Christians wanted to emphasise the states' powers, the Social Democrats were in favour of a centralist approach (Stelzer 2014). In the end, the result was a compromise.[10] Federation and states fulfil separate legislative and executive tasks autonomously and independent of each other. Insofar as the federal constitution does not regulate certain aspects, the states are authorised to draft their own constitutions.
The allocation of powers can be found in Art 10-15 B-VG and in the F-VG[11] (Constitutional Finance Act) with regard to taxes. These articles provide an exhaustive list of tasks, divided between the federation and the constituent states. All the compe-

7. Bundes-Verfassungsgesetz (B-VG), BGBl 1930/1 version BGBl I 1999/194.
8. Cf. section 2.3.1 for more details.
9. Verfassungs-Überleitungsgesetz – V-ÜG, StGBl 1945/4.
10. Vienna, Styria, Upper Austria, Lower Austria, Burgenland, Carinthia, Salzburg, Tyrol, Vorarlberg; *see* Art 2 para 2 B-VG.
11. Finanz-Verfassungsgesetz 1948 – F-VG, BGBl 1948/45 version BGBl I 1999/194.

tences in Art 10 B-VG with regard to legislation and executive power are the responsibility of the federation. Art 11 B-VG, however, stipulates that while it is the federation's responsibility to legislate, the constituent states are responsible for implementing these laws. Furthermore, pursuant to Art 12 B-VG the federation only formulates general legal principles and consequently the states have to draft implementing legislation that reflects these general principles. The constituent states' authority to both legislate and implement legislation is laid down in Art 15 B-VG. Although in principle the intention is that whenever a specific area cannot be summarised under Art 10-12 B-VG, the constituent states become solely competent according to Art 15 B-VG, the number of competences allocated to the states is low.[12]

There are also so called 'special' competences, e.g. with regard to the schooling system (Art 14 B-VG), public procurement (Art 14b B-VG) or Art 13 B-VG in conjunction with the F-VG for finances.

2.3.2 Division of competences in social security

There is no explicit social security competence in the Austrian constitution. Social insurance is referred to in Art 10 (1.11) B-VG. This provision determines that social insurance lies within the responsibility of the federation with regard to legislation and implementation. The same applies to care allowances, social compensations, healthcare (point 12 *leg cit*) and the compensation of family expenses (point 17 *leg cit*).

Poor relief, particularly social assistance schemes, is addressed in Art 12 B-VG. Hence, the federation is responsible for drafting framework legislation and the general principles set by federal law in this framework legislation have to be transposed into applicable laws by the constituent states.

According to Art 15a B-VG however, the federation and (one or more of) the constituent states as well as the constitutent states among themselves can sign agreements related to matters within their field of competences.[13]

A significant modification of this allocation of powers has been made with regard to care allowances. Care as such was regulated in Art 12 B-VG, which led to highly fragmented implementing legislation on all things care-related (services and allowances). This was considered to be a very unsatisfactory situation and so a separate 'care allowances' competence was created and introduced in Art 10 (1.11) B-VG. The 'care services' competence remains in Art 12 B-VG. For this reason care services are mainly administered by the district authorities within the framework of the respective states' administration.

Since all social insurance carriers are self-governing bodies in Austria, acknowledged by Art 120a-c B-VG, they are free to work independently and to pass deci-

12. Cf. Berka 2018; Stelzer 2014.
13. Cf. 2.3.3 for more details.

sions and orders with normative power[14]. In doing so, however, they are under the supervision of the government.

2.3.3 Local responsibility or solidarity between local states/regions

In addition to a duty of consideration between the federation and the constituent states, the agreements mentioned above referred to in Art 15a B-VG form the most relevant legal instruments with regard to solidarity.[15] The most prominent example of such an agreement for social security still is the BMS-V[16] (needs-based minimum benefit scheme agreement) concluded in 2010, regarding social assistance. Since social assistance is a matter for Art 12 B-VG, all nine constituent states can draft implementing legislation with the result that there are nine different levels of legislation in Austria when it comes to social assistance. In the BMS-V the states agreed on a minimum threshold in order to ensure certain nationwide standards. However, the BMS-V expired in December 2016, and despite intense discussions and negotiations at federal as well as state level, it has not been possible to find a compromise. As a result, the subsidiary competence of Art 15 B-VG in favour of the states became effective on 1 January 2017. In other words, the competence regarding the regulation of social assistance returned to the states and, starting in Upper and Lower Austria, these states have proceeded to pass laws that only apply in their state territory. In the case of Lower Austria, in March 2018, the VfGH (Austrian Constitutional Court) abolished Section 11a and 11b NÖ MSG.[17] Section 11a created an unjustified differentiation in benefits because the basic living expenses of persons who have resided in Austria for less than five years within the last six years was supposed to be no more than € 522.50. Section 11b set a monetary maximum of € 1,500 irrespective of the number of persons living in a household. The court stated that such a norm would ignore the purpose of social assistance which is to prevent social emergencies.[18] When it comes to Upper Austria, the CJEU declared parts of the Law on needs based minimum income protection in Upper Austria void.[19] [20]

Another example regards care. Despite the unification of care allowances (2.3.2), care services remain the responsibility of the constituent states due to their subsidiary competence under Art 15 B-VG. The states have therefore concluded a 15a agreement alongside the implementation of the BPGG.[21] Under this agreement the states undertake to establish minimum standards regarding stationary, ambulatory, and out-patient care services. The agreement also provides for quality assur-

14. Cf. Lienbacher/Lopatka in Mosler, Müller and Pfeil, Section 441, 9.
15. Cf. 2.3.2.
16. BGBl I 2010/96.
17. NÖ Mindestsicherungsgesetz (NÖ MSG), LGBl 9205-0.
18. Cf. VfGH 7.3.2018, G 136/2017.
19. CJEU 21.11.2018, C-713/17, *Ayub*i, EU:C:2018:929.
20. *See infra* 3.3.8 for more information on the current developments.
21. BGBl II 1993/866.

ance mechanisms, such as the installation of a 'centre of competence', which coordinates home visits for all care authorities at state level.[22] Needless to say, other care services are still regulated in very different ways. Some of the constituent states divide their territory into social and healthcare districts, some have established welfare associations.[23] A working group for nursing care has also been set up, in which representatives of the federal and state governments, the HV and the social partners participate. The main aim of this group is to file a yearly report as well as to propose further minimum standards and evaluate the needs of the system.

Other examples include the agreement on the organisation and financing of healthcare (2017), the agreement on a target control system for health (Zielsteuerung Gesundheit) in 2013 which included structural modifications and the recent amendment of the agreement on the development of institutional childcare facilities.[24]

3 The state of decentralisation

3.1 Historical remarks

In the middle ages it was primarily the church that was active in providing care for the poor through its welfare institutions. However, simultaneously, craftsmen, miners in particular, established their own safety measures in response to the high risk of occupational accidents associated with their work. Membership of the craftsmen's guilds or the miners' funds (Knappschaftskassen/Bruderladen)[25] was mandatory.[26]

The commercial code 1859[27] provided for two alternatives with regard to social security (factory or cooperative funds) while also stipulating that working conditions and social security are solely a matter of negotiations since the freedom of contract applies to employment relationships. It was the acknowledgment of the freedom of association in 1867, abolishing the prohibition to strike and the ban on coalition, which gave workers the first opportunity to unionise. However, at that time the workers' political and economic conditions were so poor that government measures were introduced to avoid turmoil, including the amendment of two acts on accident insurance (1887) and healthcare insurance (1889). Both these were

22. Ostermeyer, 2017, 13.
23. E.g. Care homes, meal services, housing assistance or cleaning services. The same is true for cost sharing, i.e. the respective 15a agreement has been abolished in 2017, LGBl (Stmk) 1979/22 abolished through LGBl 2017/69.
24. Vereinbarung gemäß Artikel 15a B-VG über eine Änderung der Vereinbarung gemäß Artikel 15a B-VG über den Ausbau des institutionellen Kinderbetreuungsangebots, BGBl I 2018/6.
25. Berggesetz 1854, RGBl 1854/146 revoked by BGBl I 1999/191.
26. Cf. Hofmeister, 1981.
27. Gewerbeordnung 1859 RGBl 1859/227; partly still in place with regards to labour law.

firmly based on Bismarck's model and introduced compulsory insurance.[28] The first pension insurance act was adopted in 1906.[29]
Unemployment insurance was introduced in the 1920s, todays AlVG dates back to 1977.[30]
The Austrian Social Insurance System has a high organisational density. In 1947, the HV (Main Association of Austrian Social Security Institutions) was established. This functions as an umbrella organisation, currently uniting 21 social insurance carriers. The organisational structure of the current social insurance system was established in 1956.[31] This was when the ASVG was adopted. From the very beginning, the ASVG covered health care, accident and pension insurance for workers and employees. Subsequently, social insurance protection has been gradually extended to civil servants (B-KUVG 1967) and self-employed persons by the GSVG, BSVG and FSVG (1978), so that nowadays 99% of the population is covered through social insurance. Over the past decades, the tendency has been to merge and simplify the fragmented and costly social security system. The abolition of the health insurance carrier for farmers and the merger of the insurance carrier for railway and mining personnel as well as the merger between the pension insurance carriers for workers and employees in 2002 serve as examples. The latest changes, such as the abolition of invalidity pensions in 2013, display the increasing effort to include proactive measures in the system.[32]

3.2 Constitutional setting

The fragmentation of social security competences in Art 10-15 B-VG (2.3), is a cause of ongoing intergovernmental negotiations and discussions in academic literature on how such fragmentation affects the efficiency of the social security system. The most significant manifestation of the asymmetrical distribution of competences can be seen when looking at inpatient and outpatient care. While outpatient care (GPs, specialists and pharmaceuticals) are a matter of federal legislation (Art 10 B-VG), inpatient care (especially hospital care) falls under joint competences under Art 12 B-VG. The situation in terms of healthcare for people with disabilities is similar.[33] There have been several attempts to transfer governmental tasks to only one level of government. With regard to care, this has been successful (2.3.3). In other areas, the reform efforts have had a rather limited outcome.[34]

28. Hofmeister, 1981; Pfeil, 2018.
29. Pfeil, 2016.
30. Cf. Resch, 2017, 4.
31. Please note, that in the course of this book-project, major changes have been adopted to the system described. The most substantial modifications are outlined shortly in chapter 4.
32. Cf. Pfeil, 2018.
33. Mayer/Pfeil, 2012.
34. E.g. Österreich Konvent (2003-2005) or the Working Group on a administrative reform (2009-2011).

3.3 Functional and territorial decentralisation[35]

3.3.1 General remarks

For the majority of the insurance carrier's structure, be it for self-employed workers, employees or only for certain specific groups, is set out in the ASVG, although this mainly regulates healthcare, accident and pension insurance for employees, family members of insured persons and certain groups of people who are not engaged in a gainful activity. All insurance carriers under the HV (and the HV itself) have to establish specific administrative bodies to ensure their functioning. These bodies are the general meeting, management board, monitoring conference, the counselling panel and the regional office committees (only for pension and accident insurance carriers since these have to establish regional offices).[36] The counselling panel is supposed to be the voice of the insured persons, however, it is not an administrative body.[37] Section 418 para 4 ASVG also allows the insurance carriers to set up optional branch offices, provided these facilitate improved economic performance and accessibility. The primary objective is to enhance proximity to the insured persons as well as to the employers.[38]

The HV, as the umbrella organisation of the social insurance carriers has to establish two additional administrative bodies, the carrier conference,[39] representing all 21 insurance carriers plus the pensioners with three representatives, and the presidential board consisting of six employee and six employer representatives.[40] It also has additional competences, the most important being the authority to issue guidelines (legally categorised as administrative regulations) that are binding for all social insurance carriers falling under it.[41] In turn, the insurance carriers may specify guidelines or file their own regulations in accordance with the HV guidelines and the law.

As for the legal sources regulating social insurance with regard to specific groups of persons, the GSVG establishes its own 'Social Insurance Authority for Business' (SVA) in terms of health and pension insurance. Nevertheless, the SVA is part of the HV. In addition to the administrative bodies, there are nine regional service committees with five representatives each.[42] Some self-employed workers are sub-

35. Please note, that serious changes to the system described are currently on the horizon. The intended changes are outlined shortly in Chapter 4 up to status 26.3.2019.
36. Section 31 para 1, Section 418 *et seq* ASVG.
37. While two sixth are pensioners and employees, one sixth consist of employers and of beneficiaries of care allowances. The members of the counselling panel may participate in meetings and add consulting remarks. *See* LSE, Volume 4, 22 *et seq* for more information on the administrative bodies.
38. Raschauer in Mosler/Müller/Pfeil, Section 418 Rz 10 *et seq*.
39. Section 441a ASVG.
40. Section 441b ASVG.
41. Section 31 ASVG.
42. LSE, Volume 4, 27.

ject to the FSVG,[43] because they are not required to register their business at the chamber of commerce since they belong to the so-called free professions.[44] In essence, the provisions of the FSVG refer to the GSVG.[45]
The SVB (Social Security Institution for Farmers)[46] covers all aspects of social security. Besides the eight regional offices,[47] regional service committees also have to be established in addition to the governing bodies to be set up by all insurance carriers under the ASVG.[48]
For civil servants and wage earners, the BVA (Insurance Institution for Public Service Wage and Salary Earners) combines healthcare insurance and accident insurance.[49] It operates a central office in Vienna and seven regional offices.[50] [51]
Section 23 ASVG, mentions one specific insurance carrier, the VAEB (Insurance Institution for Railways and Mining). Although it is mentioned among the health insurance carriers in the ASVG, it differs from the regional health insurance carriers, in that it combines health insurance with accident and pension insurance. The VAEB is responsible for the entire Austrian territory with one central and one regional office in place. Since its scope of responsibility is limited to railway workers and miners, the practical significance of the VAEB is comparatively small.

3.3.2 Health care insurance

Of the 21 insurance carriers in Austria, 18 are responsible for healthcare. As self-governing bodies, within their geographical scope the insurers determine how adequate care is provided and by which medical institutions. To this end the healthcare insurance institutions can set up, purchase and operate or hold shares in additional medical institutions[52] or they can establish their own institutions, such as walk-in clinics, which are often located directly on the premises of the regional

43. However, the provisions of the FSVG refer to the GSVG, Cf. Pfeil, 2018.
44. E.g. in particular self-employed medical doctors and architects. Notaries, a group to whom – from a systematic point of view – the FSVG would apply, constitute another peculiarity, since they fall under the scope of the NVG (Notarversicherungsgesetz). That specific act only regulates the pension insurance for notaries and establishes another insurance carrier for a total of 997 people. Cf. LSE, Volume 1, Figure 48.
45. Cf. Pfeil, 2018, 22.
46. Established by the BSVG.
47. Section 183 BSVG.
48. Section 184, 196 BSVG dealing with service matters, i.e. the granting of voluntary benefits.
49. Section 9 B-KUVG.
50. Vienna, Graz, Klagenfurt, Linz, Innsbruck, Salzburg, Bregenz; Section 131 B-KUVG.
51. Some state and municipal civil servants are insured with one of 15 KFAs (Krankenfürsorgeanstalten) established under state law offering health and accident insurance.
52. These facilities or the shares have to be financed by the insurance carriers private funding. Hence, the Federation cannot be held responsible for damages arising from facilities falling under section 23 para 6 ASVG. When it comes to choosing the form of the additional facility, the health insurance carriers are bound to choose between hospitals, sanatoriums and healths resorts and other institutions destined to treat diseases or facilities to determine the health status of insured persons.

health insurance carriers. Their primary obligation is to provide for adequate healthcare while respecting the applicable legislation.[53]
Besides establishing their own institutions, the insurance carrier's fulfil their statutory mandate by cooperating with third parties. General contracts, concluded between the HV (with the consent of all the health insurance carriers) and the Chamber of Physicians (on behalf of self-employed physicians) set the respective framework.[54] These general contracts include provisions on reimbursable services and the associated fees.[55] In addition to the general contracts, insurance carriers may conclude contracts with GPs etc.[56]
Another distinction can be made between mandatory and voluntary benefits. Mandatory benefits comprise those provided for in the ASVG itself and benefits laid down in the insurance carriers' own regulations (such as charters or 'Krankenordnungen') which list all the services they are able to provide as well the insured persons' obligations.[57] Again, comparable to the general contracts, the HV has to publish a charter template and a Krankenordnung[58] template listing the minimum health benefits[59] that have to be provided by the insurers.[60]

3.3.3 Pension Insurance

The most important legal source for pension insurance is the APG[61] (General Pension Act) which includes provisions on old age, invalidity and survivor's pensions as well as rehabilitation services.[62] Again, the APG does not provide different organisational structures but refers to the respective social security acts[63] and the respective carriers.[64]
However, federal civil servants employed before 2005 are still subject to the PG ('Pension Act') under which the federation is obliged to pay the pensions although it does not act as an insurance carrier. Instead, Section 81 PG assigns these tasks to the BVA. Civil servants employed by the states and municipalities, still receive

53. Such as the Krankenanstalten and Kuranstaltengesetz (KAKuG), BGBl I 1957/1, for example, which lays down general principles on concerning hospitals and health resorts.
54. Cf. LSE, Volume 1, 56.
55. Cf. LSE, Volume 2, 133; Section 338 ASVG, 193 GSVG.
56. The conclusion of general contracts as well as outsourcing and privatisation of hospital care is only possible, because the insurance carriers are self-governing bodies. Whenever insurance carriers carry out administrative tasks of the Federation in indirect administration, they cannot assign these tasks to private third parties. Cf. VwGH 2009/06/0152, JBl 2011, 611.
57. Section 453 ASVG.
58. Section 456 para 2.
59. This is true as well for accident- and pension insurance, *see* Section 453 ASVG.
60. As a result, entitlement to benefits as well as reimbursement may again vary between the different insurance carriers.
61. Allgemeines Pensionsgesetz (APG), BGBl I 2004/142.
62. Sections 4-7 APG.
63. ASVG, GSVG, BSVG and FSVG.
64. PVA (Pension Insurance Institution), SVA, SVB, VAEB, Insurance Institution for Notaries.

their pensions according to state legislation.[65] When pensions were harmonised[66] it was decided to gradually phase out the (costly) pension system for federal civil servants. As part of this reform pension accounts were introduced by the HV for all persons subject to the APG. Today federal civil servants are also included in the general pension system.[67] Harmonisation did not extend to assigning all organisational tasks to the PVA, which is why the insurance institutions for self-employed workers (SVA, SVB), civil servants and wage earners (BVA) have to apply the provisions set out in the APG when carrying out their tasks. In other words, the system is still clearly fragmented. This is particularly apparent with regard to the continued existence of the NVG pension insurance scheme that only applies for civil-law notaries.

3.3.4 Unemployment Insurance

While all the insurance carriers operate as self-governing bodies under the umbrella of the HV, unemployment insurance is organised differently since it is not a risk covered by the ASVG. The main operator is the AMS ('Public Employment Service Austria') a federal statutory authority.

AMS is divided into one federal organisation, nine provincial organisations and 104 regional organisations. The federal organisation's tasks include the implementation and development of labour market policies as well as the development of quality standards to ensure the best possible performance. Coordination and control of management at all levels also belong to the federal organisation's responsibilities. In order to achieve its goals and comply with the legal objectives, the federal organisation may issue respective guidelines that are binding upon all subdivisions.[6869] The provincial organisations may set up binding guidelines themselves within the framework set by the federal organisation.

3.4 Social assistance

Since the expiry of the 15a Agreement, social assistance has been governed solely by state laws.[70] However, in May 2019, the Austrian government published legislation formulating general legal principles (as in Art 12 B-VG, described above 2.3.2). The general principles set maximum amounts linked to the equalization supple-

65. As an example, in Styria, the 'Dienst- und Besoldungsrecht der Bediensteten des Landes Steiermark' applies for older civil servants whereas since 2009 the APG applies for the younger workforce (entrance date after 31st of December 2008). Aschauer/Kohlbacher, 2016, 431.
66. Neumann, 2004.
67. Section 31 ASVG, Section 10 APG.
68. www.ams.at/organisation/ueber-ams/organisation (accessed 28.3.2019).
69. The provincial offices have to be heard before issuing the guidelines, *see* Section 4 AMSG.
70. *See supra* 2.3.2.

ment, which is € 933 for a single person and 1399 euros for couples[71]). Although there is no cap per family with children (for constitutional reasons[72]), there is a gradation per child from 25% to 5% of the equalization supplement starting with the third child. Besides, persons with insufficient knowledge of the German language receive reduced social assistance by 35%. The difference on the full cash benefit is supposed to finance language courses as a contribution to enhance employability. Besides, before the expiry of a five-year waiting period, the eligibility of non-Austrian citizens or persons eligible for asylum is to be examined on a case-by-case basis. It is up to the constituent states' implementing legislation to provide for additional benefits in case actual needs are not satisfied by the benefits provided. Procedures and cost sharing are not regulated; the constituent states have until 1 January 2020 to enact respective implementing legislation.[73]
In general, Municipalities play a bigger role in social assistance than in social insurance as the regional administrative authority is the responsible welfare authority. When granting benefits in kind (e.g. meal services) the municipalities often conclude private contracts with third parties such as non-profit organisations.[74]

3.5 Powers at local decentralised level

3.5.1 Policy

The MoH (Ministry of Health) is an important actor, since it is responsible both for general health policy and for securing the general state of health of Austrian citizens. In doing so, the ministry relies on the OSR (Austrian Health Council) as a consultative body. The members of this council include health experts appointed by the MoH for a period of three years. The OSR is an independent body, which issues opinions and recommendations.[75] Where the state's government is responsible, similar councils have been established under state law.[76]
Structural policy and planning is a joint task of the federation, the constituent states and the social insurance carriers. Due to this fragmentation it has been suggested that joint bodies should be set up through which policies at all governmental levels can be channelled. For example, the 2013 healthcare reform institutionalised a joint governance instrument, the target control system for health (Zielsteuerung Gesundheit), which involved the establishment of two commissions (one at federal and one at state level. The main players in healthcare (federation, states,

71. www.oesterreich.gv.at/themen/arbeit_und_pension/pension/Seite.270224.html (accessed 8.11. 2019).
72. *See supra* 2.3.2.
73. Leitner, 2019.
74. Pfeil, 2018 and 2019.
75. www.sozialministerium.at/site/Ministerium/Willkommen_im_Ministerium/Oberster_Sanitaetsrat/ (accessed 8.11.2019).
76. E.g. Salzburger Landessantitätsrats-Gesetz, LGBl 1995/75; Wiener Landessanitätsratsgesetz, LGBl 2004/4.

health insurance carriers) are represented in these institutions. Additionally, in order to improve cooperation in terms of planning, the ÖSG (Austrian Structural Plan for Health) was introduced and the Gesundheitsplanungs-GmbH, a limited liability company to make parts of the structural planning mandatory by official decree, instated.[77]

3.5.2 Client involvement

All states have patient ombudsmen as well as patient lawyers. Some combine these offices with ombudsmen for disabled people and/or ombudsmen for care. An ombuds office has been set up at the federal office and in each of the provincial offices of the public unemployment service.[78]

A pilot project which includes family members of persons in need of care ('Relatives' Talk') was launched in 2014 in cooperation with interests groups, The project's aim was to support caring relatives and enable them to express their feelings and concerns to competent persons such as social workers and to contribute to the prevention of health impairments resulting from care and support in the family.[79] Since 2015, the measure has been incorporated in the BPGG.[80]

3.5.3 Financing[81]

Social insurance is funded from contributions on the one hand (employers and employees) and federal government financial resources on the other. The latter are used to cover non-insurance benefits such as the maternity allowance as well as to safeguard the subsidiary liability of the federation.

The share of the federal government is especially large when it comes to pension insurance, because it covers the fictional employer's contribution for insured self-employed workers. With regard to family benefits and the provision of care facilities, the states are subsidised by federal funds.[82]

While hospitals are formally contractual partners of the health insurance carriers, another 15a Agreement on the organisation and financing of the healthcare system limits the discretionary power of the health insurance carriers. According to this agreement, the health insurance carriers have to pay a portion of their income to the state healthcare funds.[83] The GKKs have to allocate 2% of the contributions

77. Section 23 Gesundheits-Zielsteuerungsgesetz (G-ZG), BGBl I 2017/131; Cf. LSE, Volume 1, 59.
78. www.ams.at/organisation/kontaktmoeglichkeiten/kontaktformular#ombudsstellen (accessed 28.3.2019).
79. Ostermeyer, 2017, 13.
80. Section 33 para 2 BPGG.
81. Please note, that in the course of this book-project, major changes have been adopted to the system described. The most substantial modifications are outlined shortly in chapter 4.
82. Esp. Family allowances (FLAF, BGBl I 1967/376) and care funds (BGBl I 2011/57).
83. Art 23.

paid to them to establish a fund at the HV in order to equalise risks between them.[84]

Care or childcare allowances are usually granted by the pension insurance carrier on behalf of the federation.[85] Some constituent states have set up additional healthcare, care or social funds. If a person is entitled to a long-term care allowance under the BPGG and that person is accommodated in a home at state (or municipality) expense, 80% of that claim goes to the cost bearers.[86] Since 2018 the states are not allowed to lay claim to assets belonging to a person making use of care facilities in order to cover the cost of these facilities. The same applies to assets belonging to their relatives and heirs. In return, the states receive an additional € 100 million per year via the nursing care fund.[87]
Unemployment insurance contributions are collected together with healthcare insurance contributions. The federation pays benefits in advance and receives compensation later.

3.5.4 Supervision

The HV is under the supervision of the respective ministries.[88] The ministries may nominate representatives who attend the meetings of the insurance carrier's administrative bodies as advisers. Representatives may object to decisions that violate legal provisions or adversely affect the federation's financial interests. The suspensory effect of such an objection delays the decision until the supervisory authority (the ministry) has considered the matter and decided whether the decision will be overturned. From a more economical perspective, the supervisory authorities may demand insight into the books in order to audit the insurance carrier's.[89]
Insofar as the AMS performs non-sovereign tasks, it is under the supervision of the BMASGK, which in turn has to establish general labour market policy targets. The management of the AMS is subject to supervision by the Court of Auditors.[90]
Because care services are so decentralised, in most cases the municipal administrative authorities are indirectly responsible for monitoring the performance of care facilities and welfare associations. The same applies for social assistance.[91]

84. Section 447a ASVG.
85. Section 23 BPGG; Section 38 and 39 KBGG.
86. Section 13 BPGG.
87. Section 330a, 330b ASVG; www.parlament.gv.at/PAKT/AKT/SCHLTHEM/SCHLAG/J2017/143Pflegeregress.shtml (accessed 28.3.2019).
88. Especially the Ministry of Labour, Social Affairs Health and Consumer Protection (BMASGK) and the Ministry of Finance (BMF).
89. E.g. Section 448 *et seq* ASVG; Section 220 *et seq* GSVG.
90. Sections 59, 60 AlVG.
91. Berka, 2018.

4 The state of the debate and future perspectives

In Austria the tendency is to centralise rather than decentralise social security. This is not only reflected in the latest constitutional amendments and in statutory social security law but also in the latest legislation to merge social security institutions in order to enhance efficiency.[92] In December 2018, an amendment passed parliament,[93] which provides that the nine GKKs (and the corporate health insurance carriers) become the Austrian health insurance carrier (Österreichische Gesundheitskasse). SVA and SVB will be merged to form one social insurance institution for self-employed persons and BVA and VAEB will form the insurance institution for public employees, railways and mining. Hence, five insurance carriers will remain instead of the current 21. In addition, the role of the HV as described above is to be changed. It will become an umbrella organisation, in the sense that it will lose competences and mainly perform coordinating tasks. Besides these and many more structural modifications, such as the abolition of the monitoring conference, the objective (especially with regard to healthcare) is to harmonise schemes for reimbursing costs associated with treatment provided by third party contractors (i.e. dentists) since these schemes vary significantly depending on which healthcare insurer is competent.[94] The majority of provisions will be effective as of 1.1.2020, but there are a number of legal questions raised before the Austrian Constitutional Court (VfGH)[95]. The most contingent questions concern the insurance carriers' special role as self-governing bodies and the constitutionality of changing their competences (i.e. with regards to the share of employee and employer representatives within the administrative bodies, the intensification of supervision by the federal state and the establishment of a 'fit and proper-test' for employee and employer representatives). Nevertheless, it is certain that the Austrian Social Security System is about to face major organisational changes within the next year(s).

92. LSE, Volumes 1-4.
93. Sozialversicherungs-Organisationsgesetz (SV-OG), BGBl 2018/100.
94. LSE, Volume 1, 2.
95. https://diepresse.com/home/innenpolitik/5592238/SPOe-zieht-wegen-Sozialversicherungsreform-vor-den-VfGH; https://diepresse.com/home/innenpolitik/5559582/Weitere-Beschwerde-beim-VfGH-wegen-Kassenreform?direct=5591639&_vl_backlink=/home/innenpolitik/5591639/index.do&selChannel= (all accessed 26.3.2019).

Devolution and decentralisation in social security: the situation in Belgium

Jessie De Weyer and Paul Schoukens

1 Belgium

1.1 State reforms: from unitary to federal state

After Belgium gained independence in 1830, it was a unitary parliamentary state with a constitutional monarch. During the 19th century, French was made the single official language by the francophone elite, also in the Dutch-speaking Flemish north of the country. Initially, the southern Walloon region was more industrialised and economically dominant, as Flanders was still reliant on subsistence agriculture. Towards the end of the 19th century a Flemish movement emerged with a focus on language rights. The 1898 'Law of equality' nominally recognised the validity of both languages in official documents. In 1932 and 1935 two monolingual regions were created on the basis of a territorial dividing line. In Flanders Dutch became the only official language and in Wallonia, the official language was exclusively French. Brussels and certain border areas were said to be bilingual (Verbeke 2012).

By the mid-1960s, the Flemish gross regional product per capita surpassed that of Wallonia. Today the Flemish region of the country is substantially richer than the Walloon region (ibid, 90). Since 1970, contemporaneous with the economic rise of the Flemish region, six state reforms (in 1970-1971, 1980, 1988-1989, 1993, 2001-2003 and 2011-2014) have transformed Belgium's state structure from a strong unitary structure to a federal state (Delperee 2017, 55; Van Damme 2015, 257). The institutional change met the Flemish demand for cultural and language rights and the Walloon demand for more economic autonomy in order to address the worsening economic situation.

An initial string of constitutional reforms, starting in 1970, recognised the existence of two kinds of federated entities, notably three Cultural Communities (Flemish, French and German-speaking) and three Regions (the Flemish, the Walloon and the Brussels Capital). The newly acquired autonomy of the Flemish and French Cultural Community was reflected in the establishment of 'cultural councils'.

These legislative bodies were allocated competences related to cultural matters. A parallel organisation for the Regions had not been established at this stage.
In 1980, a second step towards a federal state was taken. The competences of the Cultural Communities grew and started to relate to matters more wide-ranging than the cultural sector alone. Hence, the Cultural Communities started to become known as Communities. This name was considered more suitable for the new person-related, and thus not strictly cultural, competences such as health and social services that were assigned to them. Furthermore, a special majority law established the competences of the Flemish and Walloon Regions.[1] They were made competent for territory-related matters. The third series of institutional reforms in 1988-1989 fully transferred the competence relating to education to the Communities. Also, the competences of the Regions were further expanded, for example to include transport and public works. Finally, the Brussels Capital Region received its own institutions, a parliament and an executive.
The fourth state reform in 1993 above all institutionally updated the renewed allocation of competences to the federated entities. The fifth package in 2001 again expanded the competences of the Regions, for example to include local authority, agriculture and foreign trade. Moreover, the agreement provided a number of measures relating to the financing of the Communities and the extension of the fiscal powers of the Regions. Lastly, the sixth and so far final state reform dealt with the split of the electoral district Brussels-Halle-Vilvoorde and generated a new transfer of competences to the Communities and Regions, including some matters relating to social security (i.e. labour mediation and unemployment, child care and care: see below) (Alen and Feyen 2013, 57-58).

1.2 Division of competences

As a starting point it should be emphasised that the powers of the federated entities, i.e. the Communities and the Regions, are determined by assigned competence attribution. The residual competence still belongs to the federal state (Delperee 2017, 58). The Constitution, however, states otherwise: Article 35 of the Constitution states that the federal state can only have those competences that are assigned to it. This would mean that the residual powers, competences which are not specifically allocated, belong to the Communities and the Regions (Pieters 2014, 120; Van Damme 2015, 270-271). However, Article 35 contains a transitional provision which holds that the article cannot come into force before: *'…, the date of the entry into force of the new article to be inserted in Title III of the Constitution, which determines the competences exclusive to the federal authority.'* As no legal provision determining these

1. Special law on Institutional Reforms, 8 August 1980, *Official Journal* 15 August 1980. For the purposes of this text, the act will be referred as 'SLIR'. The special character of the act is related to the specific majority voting required: 2/3 majorities overall in Chamber of Deputies and Senate and a majority in each language group in each parliamentary chamber.

(exclusive) competences of the federal level has been issued to date, Article 35 has yet to come into force. To this end, a constitutional agreement has to be reached and this is not foreseeable in the near future (Delperee 2017, 58; Van Damme 2015, 270-271). The Constitutional Court has held that Article 35 is therefore of no effect.[2] Consequently, the residual power is still reserved for the federal authority.
The division of competences between the federal level, the Communities and the Regions is based on the allocation of exclusive competences. This implies that once a competence is allocated to a certain Community or Region, the federal state cannot be competent and *vice versa* (Vanpraet 2012, 209; Van Damme 2015, 262). Due to this exclusive competence approach, federal statutory acts and community and regional statutory decrees have identical legal value. As opposed to most other federal states there are in principle no concurrent competences to be found in the Belgian state structure. In order to avoid conflict of laws, the Constitutional Court makes sure that the federal state, the Communities and the Regions stay within their respective field of legislative competences (Delperee 2017, 59).
However, over the years, the Belgian state structure has allowed some softening of the principle of exclusive competences and the federated entities may enjoy implied powers. This means that the Communities and Regions may, in certain cases, legislate in relation to subjects of federal jurisdiction (Van Damme 2015, 289-290).[3] At least three prerequisites must be met to this end. First, the legislation enacted must really be necessary in order for the Community or Region to be able to exercise its explicit jurisdiction. Secondly, the subject matter must be such that it can be applied differently in the different regions. Thirdly, the intrusion of the federated entities into the federal field must only be marginal.[4]

1.3 State structure

1.3.1 The federal state, the Communities and the Regions

Article 1 of the Belgian Constitution proclaims that: *'Belgium is a federal State which is composed of Communities and Regions'*. Unlike most federal states, where the federation has grown out of previously independent states that transferred competences to the federal state, Belgium has gradually evolved from a unitary structure to a federal state (Delperee 2017, 55; Van Damme 2015, 270). This means that the central system of government has transferred competences and budgetary means to the federated entities, i.e. Communities and Regions.
As explained above, the successive state reforms resulted in two additional layers of government. Firstly, a Community system of government was added to the central system of government. This is organised around three political collectivities:

2. Court of Arbitration no. 76/98.
3. Art. 10 BWHI.
4. Court of Arbitration No. 95/98.

the Flemish, the French and the German-speaking Community.[5] As the Communities were originally established to meet the Flemish demand for cultural autonomy (Pieters 2014, 117-118), the competences relate to cultural or person-related matters such as education, culture, broadcasting and television, protection of the youth and health policy (Delperee 2017, 56).[6]

Secondly, a regional system of government was introduced. This comprises the three Regions of Flanders, Wallonia and Brussels Capital. The Regions have territory-related competences and include national and regional developments of the territory, urbanisation, environment, transport, communication and economics (Delperee 2017, 55).[7] Contrary to the Communities, the Regions were established to meet the Walloons' demands for more economic autonomy (Pieters 2014, 118). Regions and Communities have their own directly-elected parliaments and responsible executives (Delperee 2017, 55). The judiciary, however, remains federal (Pieters 2014, 119).

In addition to the Communities and Regions, the Belgian Constitution also refers to the next territorial layers, i.e. 'municipalities and provinces'. However, these territorial units are not to be considered as federated entities, yet they have been given competences (including the administrative organisation of the social assistance schemes) through territorial decentralisation (see further below). The rules on the 'composition, organisation, competencefunctioning and administrative cotrol of the municipal institutions' are established by regional statutory decree (Delperee 2017, 61).

5. Art. 2 Constitution.
6. Art. 127-129 Constitution; Art. 4 SLIR.
7. Art. 39 Constitution; Art. 6 BWHI.

Figure 1 Communities and Regions[8]

1.3.2 An asymmetric structure

The Flemish Community and the Flemish region decided to merge their institutions, administration and budgets. On the Flemish side, there is now one 'Community' governed by a single parliament and executive. Conversely, a French-speaking Community parliament and executive still exist alongside a Walloon Regional parliament and executive (Swenden and Jans 2006, 884; Van Damme 2015, 275-276).

Within the territory of Brussels, three federated collectivities – the French Community, the Flemish Community and the Brussels-Capital Region – assume responsibility (Pieters 2014, 118). This asymmetric structure is one of the major reasons why the Belgian state structure is often considered to be rather complex.

1.4 Financing the federated entities

As said previously, the Special Majority Act on Community and Region Finance of 16 January 1989 determines the financing of the Communities and Regions.

Until 1989, the financial resources for the regions were divided on the basis of a calculation referring to the average population (advantageous for Flanders), the fiscal capacity (at that time advantageous for Brussels) and the surface area (advantageous for Wallonia). With the introduction of this Special Majority Act in 1989, it was decided to waive this '1/3, 1/3, 1/3 ratio' and to make the income tax (or the fiscal capacity-factor) more decisive. This idea was partially compensated by the creation of a 'solidarity mechanism', which foresees extra financing for regions with a lower fiscal capacity than the federal average (Cantillon 2012, 719). In this

8. Belgian Government 2017.

mechanism, account is mainly taken of the size of the population (in each regional entity) and the sum of generated personal income tax. For the transfer of budgets for the recently attributed competences (2016) in the field of child care and elderly care, use is made of demographic parameters (for child care allowances, the federal budget will be distributed on the basis of the number of persons in the population group 0-18 years, whereas for elderly care the group of people of 80 years and older will serve as a basis for the calculation).
Furthermore, since social protection schemes generate income redistribution, this has affected the financial flows between the regional entities, taking into account their different levels of economic development. Due to the stronger economic development in Flanders over the last decades, major financial flows (or 'transfers') take place in the social security system, going mainly from Flanders to Wallonia. Some of these flows relate to redistributive flows depending on the extent to which i) social risks are distributed unequally between the regions and/or ii) the regional capacity to contribute to the schemes varies. Yet apart from the redistribution, there are also differences with regard to how the schemes are implemented and/or the associated policies. The transfers are often considered as potentially disruptive for the continuation of Belgium's existence.

2 Social security

2.1 The Belgian system in general

Belgian social security law distinguishes between social insurance and social assistance. The social insurance system has a professional nature, since it has different schemes for employees, self-employed persons and civil servants (Pieters 2002, 21; Pieters and Schoukens 2017, 6-10). Contrary to this, the social assistance system provides universal protection and is composed of a general social assistance benefit and some categorical assistance schemes for defined groups (Ibid, 31; ibid).
Within the Belgian social insurance system for the employees, the following schemes can be differentiated:
- the old age and survivor's pensions scheme;
- the sickness insurance covering both healthcare and work incapacity benefits;
- the scheme for industrial injuries (labour accidents) and occupational diseases;
- the unemployment scheme;
- the family allowances scheme;
- the scheme for yearly holiday allowances.[9]

The system for self-employed workers has fewer schemes, as it does not provide specific protection for labour accidents and occupational diseases, nor does it have

9. Article 21 Law of 29 June 1981 on the General Principles of Social Security, *BS* 2 July 1981.

a fully developed scheme for the risk of unemployment (although the general system does guarantee some short term income protection if the self-employed worker has to cease his/her activity or goes bankrupt). Strictly speaking, there is no general system in place for all civil servants; the protection is very much developed around a series of categorical schemes for defined groups of civil servants. Despite this, some uniform principles can be discerned in the organisation of the various social insurance schemes for civil servants. These are therefore often labelled as being the 'overall' system for the civil servants.

The professional systems arrange, on the one hand, for benefits to supplement income, e.g. covering the cost associated with children or medical care, and on the other hand for income replacement benefits, which relate to persons who are not capable of working due to work incapacity, unemployment, old age or the death of the person who guaranteed the livelihood of their partner or child.

The system of social assistance is organised quite differently from the social insurance system on several points, not least in that it is based on a general applied means test; the schemes target in the first place the needy, who cannot rely (anymore/fully) upon the social insurance schemes. Social assistance is thus residual relative to social insurance. Secondly, social assistance benefits are non-contributory, which means that they are financed from taxes and not from (earmarked) contributions paid by the professionally active (employers' and employees' contributions, self-employed workers' contributions and contributions paid for the civil servants). Thirdly, the level of the social assistance benefits is not determined by the previously (most recently) earned income, but is set at a fixed level (in relation to the minimum subsistence level) (Heylen and Verreyt 2016, 419).

The Belgian social assistance system entails the following minimum income schemes:

- the subsistence minimum, which ensures a minimum income for all citizens (universal scheme)
- the guaranteed family allowance: benefits for children in respect of whom no right can be exercised in one of the professional social insurance schemes in place (for employees, self-employed persons or civil servants)
- the minimum income and integration allowance for the handicapped
- the minimum income for the elderly

Whereas the subsistence minimum is a universal scheme, the three other schemes are categorical, addressing the needy persons belonging to a certain group. Apart from these minimum income schemes, individual assistance is also possible, provided by the municipal public centres for social welfare. This assistance can cover material and non-material social welfare services.

Social insurance and social assistance is still very much organised at federal level; it is thus mainly a competence of the federal level, although the organisation of the

social security schemes is strongly decentralised (especially, in a true *Bismarckian* fashion, at functional level and to a less extent, on the territorial scale: see below).
In addition to the federal schemes, some benefits can be organised by the federated entities (Communities/Regions). These regional schemes focus upon services developed in relation to labour mediation (Regions) and personal support schemes such as care benefits (i.e. the Flemish care insurance organised by the Flemish Community).
According to established case law of the Constitutional Court (see below), these benefits cannot be considered as social security benefits (in the strict sense), because social security benefits can only be organised as either social insurance for professional groups (such as employees and self-employed workers) or as social assistance for the needy (see more about this division below). Yet Communities can organise social benefits when they universally address the personal needs of persons living on the region's territory, or when they develop labour mediation services in support of the unemployment insurance.
The latest state reform increased the social competences of the federated entities: the Communities now have also competences with regard to child care and some specific aspects of healthcare (especially when closely related to care). The Regions now have more competences, in the field of labour mediation, with the power to follow-up and sanction (unemployed) persons in seeking work.

2.2 *The Belgian Constitution and its relevance for social security and the division of competences in the field of social security*

2.2.1 *Article 23: a fundamental social right guaranteeing stand-still*

The Belgian Constitution contains no articles stating that Belgium is a social state. Neither are there any specific safeguards or institutional guarantees regarding social security (Pieters and Schoukens 2010, 32). Yet Article 23 defines a general social right regarding (the right to) social security. This article was included in the Belgian Constitution by constitutional amendment in 1994.[10]

> *Article 23*
>
> *Everyone has the right to lead a life in keeping with human dignity. To this end, the laws, federate laws and rules referred to in Article 134 guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them. These rights include among others:*
> *1° the right to employment and to the free choice of an occupation within the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible,*

10. Constitutional amendment of 31 January 1994, *BS* 12 February 1994.

the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
2° the right to social security, to health care and to social, medical and legal aid;
3° the right to decent accommodation;
4° the right to the protection of a healthy environment;
5° the right to cultural and social fulfilment;
6° the right to family allowances.

Article 23, which contains the right to social security, consists of three separate parts, each with its own specific function. The first paragraph sets out an overarching principle, namely 'the right to live a life in conformity with human dignity' this serves as the foundation for the more specific social and economic rights. To this end, the second section of Article 23 points out that the Belgian legislator, both at the federal and the regional level, should take into account the different social, economic and cultural rights when exercising its competences. Either a federal law, a decree (of a Community or a Region) or an ordinance (of the Brussels-Capital Region) can thus substantiate the right to human dignity (Verschueren 2014, 421).

Finally, Article 23 provides a non-exhaustive list of economic, social and cultural rights that fall within the overarching principle (Pieters and Schoukens 2010, 23-32; Schoukens 2017, 11ff). However, the constitutional legislator did not supply any concrete information on how this right to social security should be interpreted. The case law of the Belgian Constitutional Court is therefore of utmost importance in determining and interpreting the practical scope of Article 23.

It is clear though that the *ratio legis* of Article 23 is not to create directly enforceable rights (Belgian Government 1992, 8-9; Belgian Government 1993, 85-86; Maes 2005-2006, 1081-1085). Nevertheless, the Constitutional Court has decided that Article 23 is a stand-still clause. This means, according to the Court, that if the legislator acts, an assessment should be made as to whether this act reduces the current protection afforded by the social rights referred to. However, a slight reduction or even a significant reduction of the protection afforded might be justified on grounds of public interest (Stroobant and Rauws 2010, 62-64).

In the aftermath of the last (sixth) state reform, Article 23 received an additional (sixth) limb referring to the need to respect the right to family allowances. Even though the right to family allowances is traditionally seen as part of the social security system, it was still felt necessary to explicitly introduce this fundamental right in Article 23 to close down the (policy) option of cuts to the scheme being made at regional level. There was indeed the fear that (in the future) one of the Communities would use their competence to abolish the scheme overall. By giving

it constitutional value as a fundamental right, this option now seems to have been made obsolete.

3 Division of competences in the field of social security

In the Constitution itself no concrete rules on the division of competences can be found; these rules are set out in the Special laws on Institutional Reforms ('SLIR') for which a specific majority vote is required (see above). The division of competences in the field of social security has evolved over the years from being a strictly federal competence to a largely federal competence with some aspects being allocated to the federated entities.

When Belgium transformed from a unitary state to a federal state, social security was not among the competences that were transferred to the Communities or Regions. Social security was seen as a residual competence of the federal state. It was not confirmed that social security is an exclusive competence of the federal government until 1980, and later also in 1988 and 1993 (Velaers and Vanpraet 2008, 327).[11] However, the concept of social security was strictly defined by the Constitutional Court as comprising, in addition to social assistance, the traditional social insurance schemes for professionally active persons[12]. In doing so it gave the federated entities some leeway to exercise their competences in other social domains, either because these have been explicitly attributed to them, or because these can be linked to the general regional competences (person-related issues for the Communities and economic issues for the Regions). For instance, the Constitutional Court held that by introducing the (Flemish) care insurance scheme in 1999 as a separate social insurance scheme, the Flemish Community was not flouting the rules on the division of competences and thus did not go beyond the person-related competences attributed to it (i.e. one of the main basic competences of the Communities: see above). One of the major considerations of the Court was that the social scheme encompassed all persons residing on Flemish (Community) territory and hence could not be considered to be a social security scheme (in the strict sense of the word) because a social security scheme involves the compensation of loss incurred by professionally active persons, which schemes are organised at federal level to avoid undesirable competition between the Wallonian and Flemish groups of workers (each hypothetically organised in their own social security schemes).

Over the years and especially with the most recent (sixth) state reform, the Communities and Regions have (slowly) gained some powers regarding social matters, *sensu lato*. The Regions for instance, are competent with regard to housing[13] and

11. Article 6, § 1, VI, section 5, 12° SLIR (Special Law on Institutional Reforms).
12. Case 33/2001, case 8/2003 and case 51/2006 in the Constitutional Court.
13. Article 6, § 1, IV SLIR.

employment[14]; where social security is concerned, their main competence lies in the field of labour mediation. The Communities are competent with regard to education[15], child care and healthcare policies, despite many exceptions in favour of the federal government[16] (in particular inasmuch as these social policies are related to how social insurance is organised). Communities are in principle also competent with regard to social aid and social assistance, in particular with regard to the organisation of the local institutions providing social assistance and with regard to the granting of additional rights to the federal social subsistence minimum. Social welfare is also a responsibility of the Communities (Pieters 2014, 121-122).
The sixth state reform brought about an important transfer of competences in the field of social security (in a broad sense) to the Communities. The Communities were given additional responsibilities in the form of 1) care for the elderly and the disabled (including homes and monthly allowances) 2) hospital care, mental health care and preventive healthcare of any kind (the federal government is, however, still responsible for more overarching health and safety concerns, e.g. the regulation of the food chain) and 3) family allowances (Pieters and Schoukens 2017, 11).[17]
With the sixth state reform, the Law of 6 January 2014 reformed the SLIR of 16 January 1989, increasing the fiscal autonomy of the Regions and the budget for the new competences allocated to the Communities and Regions was transferred via the so-called yearly 'dotations'. In total these extra dotations amount to 20 billion euros, of which 5 billion are linked to healthcare and aid to persons (Hannes 2014, 368). What is remarkable is that even though material competences with regard to social security have been transferred, the collection of the corresponding social contributions was not passed to the Communities. This remains a federal competence (Vanpraet 2014, 879-880).

3.1 A mainly federal social security system strong (functional) decentralisation and a regional system under development

3.1.1 Functional decentralisation through specialised parastatal organisations

In the field of social security, large parts of the administration are functionally decentralised to 'parastatal' organisations. These organisation are public social security institutions yet they have private actors in their governing boards. Representatives of the social partners (trade unions and employers) usually have a seat in the governing boards; but for some schemes, such as healthcare, this might be representatives of the medical professions and sickness funds. The parastatal organisations are thus semi-public by nature. In the administration of the schemes they are further assisted by various co-operating private institutions. Strictly

14. Article 6, § 1, IX SLIR.
15. Article 127, § 1, 2° Constitution.
16. Article 5, § 1, I SLIR.
17. Article 5, § 1, I SLIR; Article 5, § 1, IV SLIR.

speaking, they have been functionally decentralising some of their tasks to other specialised bodies. For instance the federal insurance fund is assisted by the sickness funds in shaping the direct relation with the persons (insured for healthcare).
The parastatal institutions are legal entities and enjoy administrative autonomy. They are subject to the administrative control of the competent minister(s). The management of the institutions is normally entrusted to a committee composed of an equal number of representatives from the respective employer and employee organisations.
The co-operating private institutions have the direct contact with the beneficiary (Pieters 2002, 24-25). Insured persons can choose freely between these co-operating bodies. If they opt not to be affiliated at all, they will be affiliated to a public institution. The government determines the rules to be followed by the co-operating bodies and exercises control through the parastatal bodies.
The schemes below (figure 2: employees; figure 3: self-employed workers) show the parastatal institutions and co-operating organisations involved in the allocation and distribution of social security benefits.

Figure 2 Organisational chart employees

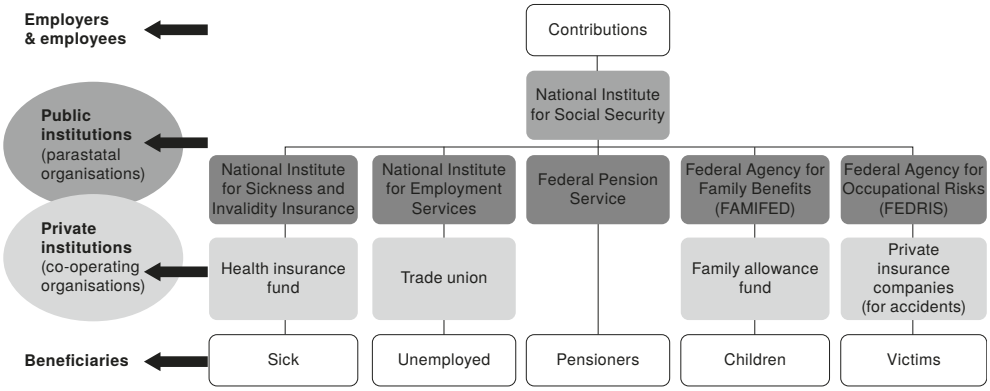
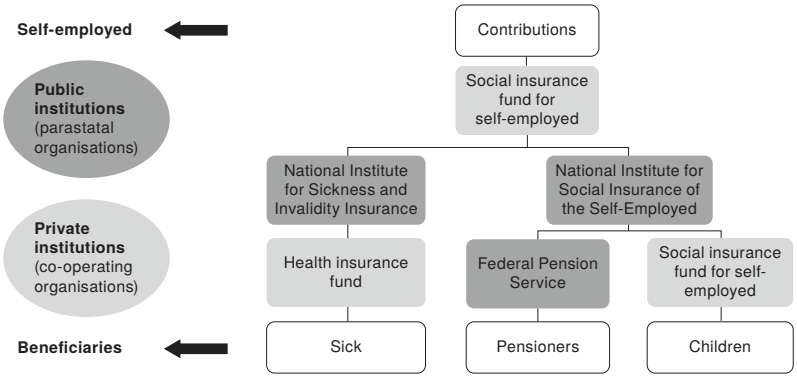


Figure 3 Organisational chart self-employed



With regard to regional insurance schemes we also note that the schemes are being decentralised in terms of function. The care insurance scheme introduced by the Flemish Community in 1999 is organised around the Flemish Care Fund, a parastatal institution cooperating with six recognised private care funds. The Care Fund distributes the financial means between the private care funds and controls their management and financing. The care fund is also responsible for the accrual and management of financial reserves to safeguard future expenses due to the growing costs as a consequence of the ageing of the population. It acts as a compensation fund for uncovered costs and compensates structural financial differences between the private care funds (due to the composition of the members).

4 Social assistance at the local level (territorial decentralisation)

The social assistance schemes are administered by (local) public bodies. Technically speaking the administration of social assistance (the universal assistance scheme) has been decentralised to the level of the municipalities (territorial decentralisation). Within the municipalities the task of administering social assistance has been (functionally) attributed to the specialised body of the Public Social Welfare Centres (Openbaar Centrum Maatschappelijk Welzijn).
Each municipality has a Welfare Centre governed by a council, the members of which are elected by the Municipality Council (the number of members depends on the size of the municipality). The Public Social Welfare Centre is responsible for organising the (universal) social assistance scheme[18] and has some discretion in shaping the eventual composition of benefits, especially when they relate to the

18. The categorical social assistance schemes are governed by the respective services responsible for the contingency for which the categorical assistance gives complementary protection: the Federal Pension Service for the assistance for elderly, Famifed for the social child assistance and the Ministry for the assistance for handicapped persons.

individual assistance benefits granted complementary to the universal assistance scheme. These personal assistance benefits may cover both material and non-material social welfare services. The main objective is to guarantee every citizen a life in human dignity (Article 23 Constitution and Article 1 OCMW-Act).
The Public Social Welfare Centres are administratively controlled by the municipality (by the board of Councillors) and by a federal inspection service under the authority of the competent Ministers of the Communities with regard to their operational organisation. With regard to the social assistance benefits they fall under the competence of the Minister of Societal Integration.
Although the Centres do enjoy some autonomy in administering the benefits, the organisation of the social assistance scheme is still strongly regulated at central level. The Centres enjoy most autonomy in organising supplementary personal assistance, in organising individualised social welfare and in decisions on recovering the cost of provided assistance (e.g. from persons who, under civil law, can be held legally responsible for their family members who have received social assistance). The element of autonomy in decisions on recovering costs has led in the past to public debates about the possible unfair (discriminatory) treatment this may give rise to depending on the residence of the beneficiary. It is felt that in particular with regard to family maintenance as a civil duty, it is unfair to legally require some parents or children of beneficiaries to repay the cost of a benefit while others are exempted from this civil law duty. This differentiation lies in the cost recovery policy followed by the local municipality. On several occasions there has been a political call to have cost recovery once again regulated at central level, but so far no changes in the legislation have been adopted to this end.
As regards funding, there is still strong central budgetary support facilitating a redistribution of means between financially strong and financially weak municipalities. The categorical social assistance schemes (for the elderly, children and handicapped) are fully funded from the central budget.[19] The financial responsibility for the general social assistance benefit is equally distributed between the local budget (1/2) and the central budget (1/2). For the personalised social assistance the municipalities take on full financial responsibility taking into account the autonomy they have in shaping this assistance. However, assistance provided at the local level to refugees and foreigners is arranged at central level.

5 Regional social security under development

The regionalisation of social security in Belgium started with the creation of the Flemish care insurance scheme in 2001,[20] under which non-medical aid and serv-

19. At the occasion of the sixth state reform and the subsequent regionalisation of the organisation of the child care scheme, it has been decided to distribute the federal means (for child care) to the Communities on the basis of a demographic key (children below the age of 18): see above.
20. Decree of 30 March 1999 regarding the Flemish Healthcare Insurance, *BS* 28 May 1999.

ices are covered up to a maximum amount. As mentioned earlier, the introduction of this regional social insurance scheme provoked a fair amount of opposition from the other federated entities, in particular the French Community and the Walloon Government. Several appeals were lodged with the Constitutional Court claiming that the Flemish government had exceeded its powers by regulating this area of social security: after all, social security was traditionally considered to be a federal competence. However, this vision was not upheld by the Belgian Constitutional Court,[21] which pronounced that as long as the schemes are not organised in the form of a professional social insurance scheme (built around the workers), they cannot be considered to be social security in the strict sense and hence federated entities can use their competences with regard to person-related matters when organising a care insurance scheme such as the one in the Flemish Community.

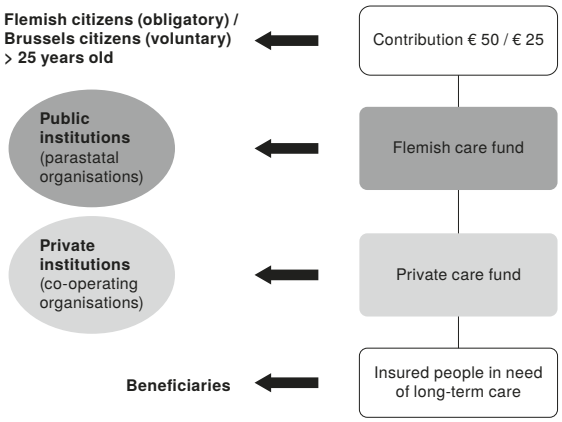
An appeal by the French Community and the Walloon Government to the European Court of Justice[22] did not change this decision, yet it did force the Flemish Community to adapt the rules in relation to the personal scope. The decree was adapted in order to allow EU citizens who exercised their (European) right of free movement and work in Flanders (or in the Brussels Region) to participate in the care insurance scheme. Pursuant to the European rules on free movement of workers these EU citizens should be given the same rights as persons residing in Flanders (or Brussels Capital Region), the primary group for which the care insurance scheme has been developed.

The Flemish care insurance scheme is thus organised as a (regional) universal social insurance scheme. All persons residing on the Flemish territory are mandatory insured. From the age of 25 years the person has to register him/herself with one of the private care insurance funds; a contribution (fixed level – 51 euro and 26 euro) is to be paid yearly. Persons residing in the Brussels Capital Region[23] can join the scheme on a voluntary basis. In order to benefit at a later stage in their life, they have to be registered in the scheme for a minimum number of years.

The organisational structure of the care insurance scheme is set out below (figure 4):

21. Constitutional Court Case 33/2001.
22. Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government and Belgian Constitutional Court* [2008] ECLI:EU:C:2008:178.
23. The only way of having the Flemish care insurance scheme organised as a Community competence was to make it voluntary for the residents of the Brussels Capital Regions as the Flemish and French Community come together in this Region and no subnationality is applied to differentiate between Dutch speaking and French speaking persons.

Figure 4 Organisational chart Flemish care insurance



Following the sixth state reform, the Flemish Community took the opportunity to exercise the competences attributed to it in the field of care and care-related social welfare services. It introduced an allowance for assistance to the elderly[24] and a basic support budget for the handicapped (e.g. for a car reconversion). Together with the Flemish care insurance scheme, these schemes currently form the so-called Flemish Social Protection System (Driessens 2016, 719). In addition to introducing these benefits this allowed the Flemish Community to integrate the existing social welfare services under the broader umbrella of the Flemish Social Protection System and hence develop a more integrated and structured approach to care-related social benefits

Child care allowances also became a regional competence under the sixth state reform. A political agreement was reached for the Communities to take charge of this scheme from 2019 onwards. So far the Flemish Community, the German-speaking Community and the Walloon Region adopted the necessary legislation and thus administer their own regional system. The child care allowance scheme for Brussels will be administered by the institution of public interest, *Iriscare*, as of 1 January 2020. Until then the scheme for Brussels is being administered under the current federal legislation by FAMIFED, the Federal Agency for Family Allowances. This was established in 2016 to integrate the existing administrative professio-

24. The allowance for assistance to the elderly is in fact the federal allowance for handicapped elderly (*tegemoetkoming gehandicapte bejaarden* – THAB. The THAB was transferred to the Communities with the sixth state reform. So far only the Flemish Community has adopted its own legislation and has incorporated the THAB in the Flemish social protection. The Decree on Flemish social protection 18 May 2018 (*BS* 17 August 2018) stipulates that as of 1 January 2019 mobility devices and institutional care for the elderly will also be incorporated in the Flemish social protection scheme. In future even more services will be included (rehabilitation centres, mental health care, day care centres, etc.).

nal social insurances bodies (employees, self-employed workers, civil servants and social assistance).[25]
In the French Community, preparations are ongoing for the development of a Community care scheme along the lines of the Flemish counterpart scheme (expected for 2019[26]).
With regard to unemployment, the Regions are competent in the field of labour mediation, a power that was increased under the sixth state reform. Consequently the three regions each have their own labour mediation service in place; for the Walloon Region, Flemish Region and Region Brussels-Capital, these are respectively: *Forem*, *VDAB* and *Actiris*. Apart from the organisation of the mediation itself, the regions gained more power to follow-up and check jobseekers, while the sanctioning (of misbehaviour) still falls under the competence of the federal Institute for Unemployment services.

6 The state of the debate and future perspectives

6.1 Arguments in favour of devolution and decentralisation

The debate for more (or less) devolution in Belgium focuses particularly on the regionalisation of the social security system. The high degree of (functional) decentralisation does not generate as much discussion in the public debate, although traditional arguments against (more) devolution – such as splitting up the solidarity groups and a high degree of complexity – can definitely be raised in relation to the highly functionally decentralised system in Belgium.
Arguments in favour often refer to the (closer) relationship the citizen has with the social welfare system, the possibility to adapt the system better to the regional/local needs and the stronger readiness of the citizen – who is now closer and better connected to the system – to generate solidarity with his/her fellow citizens.
In the recent debate on further regionalising social security (institutional care, child care, etc.), the close relationship between citizens and systems has definitely been put forward as an argument in favour of this. Yet probably more important is the need to fine-tune the system more to the specificities of the regions. This argument has often been heard in relation to the regionalisation of labour mediation. The profiles of unemployed persons differ in the north and the south of the country, yet similar (application) rules were applied for both groups, frustrating both the unemployed people and the institutions. By giving more competence to the

25. Flemish Community: Decreet van 18 april 2018 tot regeling van de toelagen in het kader van het gezinsbeleid. German-speaking community: Dekret über die Familienleistungen 23 April 2018. French Community: Décret relative à la gestion et au paiement des prestations familiales, 8 February 2018.
26. Care scheme Wallonia: Assurance Autonomie (Portail de la Wallonie, 2018), Brussels Capital and German-speaking community both ordered a feasibility study regarding care insurance.

regions, the systems can better adapt to the specific needs of the groups within the region.
Taking into account the constitutional approach of exclusive competences and the fact that the country mainly consists of two major (language) groups, further regionalisation is often advocated on the basis of homogenous policy packages, where regulation, financing and executing/sanctioning tools remain at the same (central or regional) level. In other words, where a decision has been taken to transfer some regulatory powers, it is recommended that the tools for financing and implementing these powers are also transferred (possible at a later date). If this is not done, the competent level could be hindered in exercising its competences in the most effective/efficient way. This might lead to a gradual competence attribution over time. An example of this can be found in the family allowances where the Communities had been granted the power to develop a family policy in 1989, but an important element of this policy, the family allowances, was absent (recently addressed in the sixth state reform).
Thirdly, as people feel more connected to the social security system, they will become more willing to show solidarity. As a result of this sense of connectedness, individuals will be more willing to see resources redistributed at local or regional level than at the more heterogeneous national level. Finally, social federalism can also lead to more experimentation, more policy innovation, since it is easier to try out new schemes and new ways of making people show solidarity with one another (Cantillon 2011, 80 *et seq*).

6.2 Arguments against devolution and decentralisation

The traditional arguments against the devolution of social security (or social federalism (Cantillon 2011, 76 *et seq*)) are founded on economies of scale, the risk of competition between the entities and generating a lack of solidarity.
Devolution is at odds with the classical theory of fiscal federalism, which claims that insurance and solidarity schemes benefit from a broad territorial scope (social efficacy): the larger the scope, the more effectively the financial burden can be distributed. Conversely, the smaller the scope, the less effective the distribution will be. However this theory is also being relativised. Large systems organised at a distance create less connectedness with citizens (and hence less support for and readiness to pay into the system). Along the same lines, and in strict application of this theory, some suggest that the ideal level at which social security should be organised is the European Union.
Another argument against further devolution is based on the risk of downward social competition between the devolved entities. The Constitutional Court in particular has taken up this line of argumentation by stating that when directed towards the professionally active population (employees, self-employed workers), the social security system (in the strict sense) should remain at federal level to

avoid unwanted competition between the workers (and workers systems) arising between the federated entities. According to the Court the Belgian economic union is too small and too interwoven to allow such competition.

Thirdly, devolving social security would adversely affect the generation of the required levels of solidarity needed to achieve the desired level of income redistribution. This argument is probably most often raised in discussions on the pros and cons of the regionalisation of social security. But here too, some counter arguments have been developed, based, for instance, on direct elements of solidarity included in the special majority act on Community and Region finance: solidarity can also be organised through the financing of the federated entities. Others refer to the current system of professional social insurance schemes where solidarity is also divided between the various groups of working people.

Finally, arguments against devolution relate to the growing complexity of the system. By splitting up the social security system into various regional schemes, a need for coordination will emerge, taking into account the rather high degree of mobility of persons on the territory. This will inevitably lead to some levels of complexity, especially as these 'national' coordination rules will have to be fine-tuned with the European rules. As the regional systems, in line with the case law of the Constitutional Court, are developed along the lines of residence based schemes, and the European coordination rules mainly give precedence to work/professional activities to solve conflicts of law, a new potential for complicated rules aligning the regional rules with European law may emerge.

Devolution and decentralisation in social security: the situation in the Czech Republic

Jakub Tomšej[*]

1 A general picture of the social security system and administrative structure

The Czech social security system is relatively complex. It consists of several independent structures aiming to protect the social position of beneficiaries against contingencies such as sickness, maternity, poverty, etc. As an EU member state with a continental legal system the Czech Republic is characterised by the emphasis on statute and the relatively strong position of the state in determining social security policy and deciding on individuals' claims.

After World War 2 and in particular following the communist coup d'état in 1948, local social legislation was strongly influenced by Soviet regulation, although Czechoslovakia did not entirely share the status and challenges of the Soviet Union economy at that time. Some traces of this can still be seen in the system today.

Although the communist regime's priority was to gain full control over all social security systems and the government did not hesitate to nationalise entire sectors (e.g. healthcare), it must be acknowledged that the level of social protection of some groups of employees (in particular the worker´s class) did improve (an entirely different conclusion would, of course, need to be drawn with respect to human and in particular political rights). In the 1970s, population impact measures were based on a more family-friendly policy introduced by the government.

After the Velvet Revolution in 1989, Czechoslovakia (and subsequently its successors, the Czech and the Slovak Republic, established in 1993) embarked upon the path of a liberal, democratic country. A major reform of the social security system was necessary, in particular taking into account a shift in the paradigm from social-

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istic to capitalistic economy, accompanied with a shift from the Soviet system of social security to a modern system characterised by stronger insurance principles. The reforms were also aimed at avoiding significant differences in the treatment of specific groups of beneficiaries (e.g. so-called personal retirement pensions for certain privileged individuals and the unprofitable treatment of self-employed individuals) and increase equality in the systems (Tröster 2013).

The first ten years following the Velvet Revolution saw significant changes introduced. The concept of a 'social safety net' was enacted based largely on instruments such as minimum wage and subsistence income. Health and social insurance payments were separated from the tax system and transferred to standalone pension, health and sickness insurance schemes with separate financing. Many new laws establishing various social security benefits were adopted, most of which are currently still in force.

The pace of the reforms has slowed down in the new millennium. The sustainability of pension insurance turned out to be the major issue. To date, the pension system is still largely based on the compulsory pay as you go state scheme, supplemented by a voluntary pension plan (Rytířová 2013). Between 2010 and 2012, the right wing Czech government introduced a reform of the system, creating a three-pillar system in which the mandatory pay as you go system was supplemented by two voluntary pension plans under which individuals could deposit their savings in personal accounts. However, lack of agreement on the reform across the political parties resulted in the subsequent left-wing government cancelling the reform with no replacement.

Currently, the Czech social security system is structured as follows:

- **The insurance sub-system**, comprising pension insurance, health insurance and sickness insurance schemes. As indicated above, these schemes are funded by way of a compulsory insurance fee deducted from the salary or other income of an individual. This deduction is a separate payment rather than being part of the income tax regime. The lawmaker flirted with the idea of introducing a separate insurance scheme covering accidents at work and occupational disease claims[1], but this has never been introduced and the claims are currently covered by the employer´s liability for compensation and statutory insurance at a private insurance company (Bělina 2014).
- **The state social support system**, focusing mainly on support for families and children and defining the benefits to be provided to members of such lower income families. The most important being a 'parental benefit', which is provided to parents of small children until the 2nd – 4th birthday of the child.

1. The Act No. 266/2006 Sb., on accidental insurance, was intended to become effective as of 1 January 2007. Due to anticipated high costs connected with the insurance systems, the effectiveness of the act was postponed repeatedly, and finally the act was repealed.

– **The state social assistance system** representing the last resort of the social safety net and covering assistance for those facing poverty and requiring various social services. This system also includes a set of benefits for disabled persons and social services.

The main administrative organisations responsible for the social insurance schemes are the Czech Social Security Administration for pension and sickness insurance, and private health insurance companies. Labour Offices are responsible for the management of most of the support provided under the state social support system and support in material needs. Local authorities have a relatively strong position in the field of social services where private entities might also operate.

2 The state of devolution

2.1 Historical remarks

Before 1918, Czech territory formed a part of the Austrian and subsequently Austro-Hungarian monarchy which was characterised by a centralised government that usually declined any requests for the transfer of powers to provinces or lower territorial units (despite this, some achievements were made in the second half of the 19th century). The establishment of the new Czechoslovak Republic therefore raised hopes for a greater level of devolution and decentralisation.

Although the Czechoslovak Republic formally took over the laws of its predecessor, significant reforms were started immediately. A new act on the establishment of districts with significant powers – so called *župa* in Czech language – became effective in February 1920. The territory of the country was divided into 21 *župa* which were to be governed by a local authority established in each *župa*, as well as elected local governments (Malý 1999). As there was strong opposition to the new system, it never entered fully into force.

A new regulation was finally approved in 1927 which returned the country to a centralised system of government with strong powers for the central public authorities and fewer powers for the local administration. The republic was divided into four counties governed by local county authorities and governments, again with limited powers in the field of social security.

During World War 2, significant parts of the territory became part of the German territory. An autonomous Slovak Country was announced and the rest of the Czechoslovak Republic was turned into a Protectorate Czechia-Moravia with a strong central government heavily influenced by the Nazi structures.

After the end of World War 2, Czechoslovakia belonged to the winners of the war. One of the priorities of the Kosice government programme adopted in April 1945 (named after the city where it was approved) was the decentralisation of government by creating 'national councils' at three levels (local level, district level and

county level). National councils consisted of a head and various committees and bodies (Jíša 1980).
National councils have remained an important part of the government even after the communist coup d'état in 1948. Although some changes were introduced to the system (e.g. in 1950, counties were split into 19 regions), the councils kept their influence over the state administration until the end of the communist regime. However, they served as an extended arm of the communist party for the centralised management of economics and society. Principles of self-administration were limited and any decision taking was based on the principle of democratic centralism, the local councils being bound by decisions taken by superior councils and state authorities. Where the councils did have any powers in the field of social security, their responsibility was more or less limited to implementing decisions adopted at country level.
After 1989, important changes started to take place. In 1993, with the establishment of the standalone Czech Republic, a new Constitution became effective.[2] The setting envisaged by the Czech Constitution is described below.
In summary, it can be concluded that the Czech Republic does not have a lot of experience with decentralised government models and that the current centralised structure of the social security system is simply a legacy of this history.

2.2 Constitutional setting

The Czech Constitution is a modern parliamentary republic constitution with focus on the division of executive, legislative and judicial powers and a relatively strong local Parliament. After being in force for almost 25 years, it has proven to be a stable and solid basis for the management of the state that has been subject to very few legislative changes.
The first article of the Constitution states that the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Legislative powers are vested in a Parliament which consists of a Lower Chamber (Chamber of Deputies) and an Upper Chamber (Senate). Government plays a critical role within the executive powers and it also submits the majority of bill proposals to the Parliaments. A separate law (a so-called Competence Act) defines the ministries and other administrative offices and their responsibilities. In the field of social security, the Ministry of Healthcare and the Ministry of Labour and Social Affairs play a key role. Ministries, other administrative offices, and bodies of territorial self-governing units may adopt regulations only if expressly authorised to do so by law. Judicial powers are separated from other powers with some exceptions (e.g. the appointment of judges, where the Ministry of Justice and the President are the decision makers).

2. Act No. 1/1993 Sb.

The Constitution establishes the Supreme Administrative Court as the highest tribunal for administrative disputes (including claims of individuals against public authorities related to social security) (Pavlíček 2015).
The Czech Constitution also creates a basis for territorial self-government. Under Article 99, the Czech Republic is subdivided into municipalities, which are the basic territorial self-governing units and into regions, which are the higher territorial self-governing units. Each of the units is managed by their representative bodies. The majority of such bodies are formed through regular elections that are organised every four years. The units are deemed to be public law corporations which may own property and perform legal acts. The state may intervene in the affairs of territorial self-governing units only if required for the protection of law and using only processes described in the laws.

2.3 The division of competences between the layers of government

2.3.1 State structure (i.e. federal, confederal, unitary)

The Czech Republic has been established as a successor to the former Czech federal republic within the Czechoslovak Republic. Even though it consists of three parts each with a slightly different history (Bohemia in the west, Moravia in the east and Silesia in the north-east), the Czech Republic is a unitary country. Although Bohemia could be perceived as the strongest part of the country with the biggest territory including the capital of Prague and a stronger economy, we do not see any concerns raised about this arrangement from other regions.[3] This situation results from the fact that inhabitants of all the regions have the same national and ethnical background (Czechs) and there are no strong national minorities since the forced expulsion of millions of Germans from the Czechoslovak territory in 1945-6.
The level of decentralisation in the Czech Republic is very low. The administration of the country is heavily influenced by the central government, ministries and other central public authorities.
In accordance with the constitution, the country was divided into 13 regions (with the capital city of Prague being in a similar position as the regions and thus a 14th region *sui generis*). Each of the regions has its own elected council, a head (so-called *hejtman*) and a local authority.
Municipalities have a relatively strong management position with regard to matters specifically related to their territory (the Czech Republic seems to follow the subsidiarity principles in this respect).

3. Since the establishment of the country, we have heard isolated voices asking for greater level of autonomy of Moravia, e.g. by way of creation of a federation. Such voices are however relatively rare even within the territory of Moravia; Moravian patriotic parties have been trying their luck in elections without success (their best result was 0,3% in 1998) and since 2013, there is no party which would represent the interests of Moravans. Source: www.volby.cz.

2.3.2 *Division of competences in social security*

As indicated above, the Czech social security system is relatively complex and is composed of several branches 'owned' and operated by different entities.

Health insurance and private pension insurance is managed by private entities – health insurance companies and private pension funds. All these entities operate throughout the Czech Republic and usually have a network of contact centres in many cities and towns around the country.

State-owned pension insurance and sickness insurance schemes are managed by the Czech Social Security Administration (commonly known under its Czech abbreviation CSSZ). The CSSZ consists of several regional offices although these are managed by the Prague headquarters. Regional offices have the power to take administrative decisions in first instance (e.g. to grant an individual an old age pension), against which an appeal to the Ministry of Labour and Social Affairs can be filed.

Other monetary benefits paid for by the state are managed by the Labour Office. Like the CSSZ, the Labour Offices are managed by the Ministry of Labour and Social Affairs. Their structure is however more complex as they consist of a General Directorate and 14 regional Labour Offices that in turn establish a rich network of contact offices, providing full scope services to individuals. As in the case with the CSSZ, the regional Labour Offices issue administrative decisions that are reviewed by the Ministry.

Both the CSSZ and the Labour Offices are limited in their decision-taking by the applicable legal regulations as well as by the instructions issued by superior the public authority. In practice, it would be rather typical to see, for example, the General Directorate of the Labour Office issuing detailed guidelines regarding the applicable processes, rules on entitlement to the benefits etc., leaving just limited room for a local decision-making process. Local clerks are more likely to carry out a 'checkbox ticking' than apply wide discretion. This would primarily bring the advantage of a unified approach to nation-wide regulation.

A different situation applies in the state social assistance system. Benefits for people in material need are managed by Labour Offices using the principles outlined above. An important part of this system is, however, formed by social services. In this area, regional authorities can play three roles: as a public authority, they decide on the registration of most social service providers. In some cases, social service providers can apply for subsidies provided from the region´s budget (these subsidies are usually in the shadow of more significant support provided from the state budget, or potentially from the European social fund, but can still represent a welcome contribution for the providers). In many cases, social service providers are even founded by the region and its representatives are involved in their management e.g. as supervisory board members.

2.3.3 Local responsibility or solidarity between local states/regions

Czech Republic is currently facing some debates about the future of the social security system. On the other hand, little attention is paid to the topic of 'ownership' of the social security instruments. Even though we may have heard some voices asking for more autonomy at local level, a consistent approach to the social security instruments appears to be the main argument why there are no current major initiatives proposing a shift of some of the powers and responsibilities from the country level to the regional level (not even the municipalities themselves seem to be interested in such a change).

3 The state of decentralisation

3.1 Historical overview

Historically, the municipalities have often played a very important role in social security. Within the Czech territory, the church was traditionally most involved in providing support to elderly and disabled citizens. Some professions were also united in guilds which provided support to the families of their members. Since the 18th century, we have seen these powers transferring to municipalities. In 1868, the right of domicile was enacted, meaning that municipalities would provide accommodation, food and other support only to those who lived within its borders (Tröster 2013).

Since the 18th century, we have also seen a parallel increase in the engagement of the state in the same area. Under the reign of the Queen Maria Theresia in the second half of the 18th century, steps were made towards the establishment of professional public service where state employees, their widows and children were eligible for a pension payable by the state (Schulze 1996). The change in the political system after 1989 made Czechoslovakia a federal republic with a strong central government. After the division of the country into two separate republics, the powers of the former central government were merged with the powers of the previous federal government and strong voice of the regions was weakened.

At that time the territorial government of the country consisted of municipalities and small districts (in Czech *okresy*). Since 1993, there have been 75 districts. Each district governed by a district authority, however, no elected government existed at this level (only at municipality level).

In 1998, the newly elected government announced a reform of the territorial self-government. A so-called connected model, in which the elected self-government would provide some parts of the public service to the extent laid down by law. This opened up potential for self-governments to gain powers in the field of social security as well, provided this was enacted in the relevant laws governing the social security systems. At this stage, the district authorities were replaced with the idea of 'municipal authorities with extended powers', and the powers of the dis-

trict authorities were divided between the 205 largest municipal authorities. Other municipal authorities (usually only the very small ones) retained their original powers. The activity of the district authorities finally ceased on 31 December 2002.
Parallel to this, the system of regions referred to above, consisting of 13 regions and the capital city Prague, was established.
On the basis of the above, a two level model of territorial self-government was created. In practice, this model resulted in most public authorities having deconcentrated branches across the country (e.g. Police, Labour Offices, Public Health authorities, CSSZ etc.).
Until 2011, municipal authorities have played an important role in the field of social security as they were responsible for the administration of most non-insurance based benefits, including the state social support, benefits for people in material need and benefits for disabled people.
This model was subject to criticism. One of the reasons was the financial burden of maintaining sufficient headcount at all municipal offices with extended powers. The Ministry of Labour and Social Affairs[4] for instance, stated that the administration of the benefits for people in material need alone required a headcount of more than 1,800 workers; if these tasks would have been centralised within one authority, this would – according to the Ministry – lead to cost reductions. Another issue regarded the alleged different quality of services provided in the different municipalities, which appeared to be difficult to standardise.
As a result, in 2011 the Czech Government approved the idea of converting the Labour Office into a one-stop-shop centre where, besides services in the field of employment, all non-insurance benefits would be administered. In addition to the arguments summarised above, it was also argued that this would simplify the procedure for applicants and accelerate the processes. The change was successfully approved by the Parliament and become effective on 1 January 2012.
The actual transfer of the benefits to the Labour Office has not been problem-free due to several technical issues that the Labour Office was apparently not very quick to resolve. Some concerns regarding the execution of the transfer of the relevant employees from the municipalities to the Labour Office have been raised publicly. These issues, however, have been resolved and since then the whole system appears to work without major issues.
The social security system has since remained relatively stable in terms of the division of responsibilities between the layers and authorities and no changes affecting such division are currently envisaged or discussed.

4. Statement of reasons of the relevant bill, available here: www.kvalitavpraxi.cz/res/archive/015/001856.pdf?seek=1300195967.

3.2 Constitutional setting

The Czech constitutional system consists of the Czech Constitution and the Bill of Fundamental Rights and Freedoms which was adopted in 1991. Applicable international treaties on the protection of human rights that have been duly ratified also form part of the Czech constitutional system and prevail over local non-constitutional laws.
Social rights, such as the right to adequate material security in old age and during work capacity, the right to support in material need, the right to healthcare and specific protection of parents, families and pregnant women, are listed in the fourth head of the Charter.
The social rights framework provided by the Charter is deliberately vague, leaving it up to the lawmaker to define the conditions for these rights and the responsibilities and processes in non-constitutional laws. Neither therefore does the Charter say anything about the authorities who will be involved in the process and nor does not provide for any rules relating to a decentralisation of the systems.

3.3 Functional decentralisation versus territorial decentralisation

As explained above, functional decentralisation is of key importance in the Czech social security system, as the responsibilities are divided between a number of players based on the function that they relate to. Territorial decentralisation is, on the other hand, rather limited.

3.4 The powers at local decentralised level

In general, the powers of territorial layers of government are governed by the Act on Municipalities, Act on the Capital City of Prague and Act on Regions (Klíma 2006).
Functional decentralisation within social security is described in the laws governing the areas of social security, such as the Health Insurance Act, Sickness Insurance Act, Pension Insurance Act, Act on State Social Support, Act on Support in Material Need, Act on Social Services etc.

3.4.1 Policy

Under the Constitution, municipal authorities can adopt policies (which are referred to as *generally binding decrees* or *regulations* by the Czech laws). They can regulate either certain areas left to municipal self-government (e.g. issues of public order in the municipalities, maintaining clean streets etc.) or other areas inasmuch as has been explicitly foreseen by laws regulating such area. Municipalities, however, do not have the right to adopt any policies affecting the social security and

any policy adopted without explicit authorisation under social security laws will be declared null and void.

3.4.2 Establishing claims and providing services

Tasks relating to establishing claims and providing services are divided between those institutions that own some of the various social security benefits.

In summary, claims are established in accordance with administrative procedures governed by the Czech Administrative Procedure Act.[5] The procedure usually starts with an application filed by an individual on the appropriate form, asking the competent authority to award the benefit to him/her. During the procedure the authority reviews whether all the conditions are fulfilled, and if yes, awards the benefit to the applicant. In cases where the authority has decided based on incorrect information (e.g. due to a fraud attempt on the applicant´s part), it can re-open the procedure, change the entitlement and claim back any payments provided contrary to the law (Tröster 2013).

In the past, inequality was a concern in social security law: different groups of individuals were provided for differently depending on their status and inconsistencies were reported in how individuals were treated. Thus, a focus on standardisation in social security issues can be seen and authorities usually have little discretion when deciding on an individual´s claims. An increased level of discretion can be observed in the state social assistance system. For example, when deciding whether an individual is eligible for benefits for individuals facing poverty,[6] the Labour Office reviews whether an individual has made reasonable efforts to gain income by other means, e.g. by selling their property or enforcing receivables against third persons.[7] No exact guidelines for this element have, however, been set, and it is up to the discretion of the Office to determine if this condition has been fulfilled.

3.4.3 Local authorities and third party service delivery

PPP projects, where the private sector participates in providing services that would typically be a task of the public sphere, have become relatively popular in the Czech Republic recently. The deployment of private institutions in the field of social security is not rare and has various forms. Health insurance companies and private pension funds play an important role in the management of insurance systems. Even though their activity is limited by applicable laws, they can compete and attract customers by providing a better level of services.

5. Act No. 500/2004 Sb.
6. Act No. 111/2006 Sb., on help in material need.
7. Section 11 (1), (2) of the said Act.

Service delivery through third parties is also typical in the field of social services. The new Act on Social Services[8] introduced a regime under which individuals are free to can choose the provider at which they spend the benefits provided by the state to fund their personal care, or they can involve their family members in this (so-called 'contribution per head' approach). This increases the pressure on the quality of services and competition among providers, whilst maintaining the availability of social services to those who would not be able to fund them from their own resources.

3.4.4 Supervision

Unlike employment relations where most of the supervisory powers are concentrated in the Labour Inspection Authority, supervision of the social security regulations is the responsibility of multiple institutions.

As most of the benefits are awarded by the respective public authority as part of an administrative procedure, most of the supervisory powers rest with the superior offices (e.g. General Directorate of the Labour Office) or the relevant ministry (i.e. Ministry of Healthcare for health insurance and Ministry of Labour and Social Affairs for all other social security systems).

The superior offices are tasked with determining strategies for the respective social security instruments and with issuing internal guidelines and monitoring compliance with these. They are expected to attempt to unify the inferior authorities in their approach to resolving matters and individual cases of non-compliance should be addressed in an appropriate way (including disciplinary actions where reasonable).

In individual cases where a decision on a claim is issued contrary to the law, an appeal can be filed to the Ministry of Labour and Social Affairs. Where an individual is not satisfied with the outcome of the appellate proceedings, the case can be brought to court. There is a two instance administrative court system in the Czech Republic, consisting of 8 regional courts and one Supreme Administrative Court. In most social security cases, matters are heard by one judge in the first instance and by a senate composed of three professional judges in the second instance.

In the field of social services, regions have an important responsibility to ensure that the providers of social services comply with the legal regulations. In cases of non-compliance, significant fines and other sanctions may be imposed.

8. Act No. 107/2006 Sb.

3.4.5 Financing

The financing of social security has been one of the major questions of today. In particular the pension system appears to be in crisis, as it is still based on the compulsory pay-as-you-go scheme which is not sustainable and is unlikely to be able to cover the costs of the pensions in long term. Besides the pay-as-you-go system, there is only a voluntary third pillar which gives individuals the opportunity to allocate their savings at private pension funds and their employers to contribute to such a system.

Non-insurance based benefits are funded from the state budget and thus financed from general taxation. While these benefits continue to be an important source of income for many individuals, the trend in the previous years has been to decrease some of the benefits or harden the eligibility rules.

Social services are paid from multiple resources: a significant part of the costs should be covered by the beneficiaries, who may take advantage of the monetary contribution for care, a benefit provided by the state to some individuals who are in need of social services. Part of the costs can be covered from other resources: regions, Ministries as well as other bodies (including the European Social Fund) provide for diverse opportunities where social service providers may apply for funding.

Given the current state of decentralisation of social security, municipalities do not participate at the financing of social security.

3.4.6 Client involvement

All the bodies that manage specific benefits payable under social security schemes (i.e. mainly the CSSZ, Labour Office, health insurance companies) should be able to provide information and advice to clients. The public defender of rights (ombudsman) may also provide counselling in the field of social security benefits and protect the clients from any discrimination and any conduct of the authorities that would be against the law, would not correspond to the principles of a democratic legal state and the principles of good administration, or in case the authorities are inactive.

Clients may form civil associations which defend the rights of clients (or certain categories of clients, e.g. those with a certain disability) and provide counselling and supports to those who need it. Such civil associations can also take on the role of a social services provider. Establishing a civil association is an easy process where at least three individuals must agree upon articles of association, and the association must be registered in the relevant register.

3.4.7 Decentralisation paradox?

The status quo in the Czech Republic may reflect considerations like the decentralization paradox.

4 The state of the debate and future perspectives

As this paper has shown, the Czech Republic has moved from a territorial decentralised system with strong powers of municipalities to a system where the prevailing approach focuses on centralised social security systems with a relatively high level of deconcentration. A decentralisation of powers can only be found in the field of social services where regions have retained their competences.

There is presently a wide consensus that the current deconcentrated model works well. When the transfer of the administration of non-insurance based benefits from municipalities to Labour Offices was proposed, many voices were raised against this, claiming that this would endanger the due and timely provision of benefits. Current experience shows that Labour Offices can provide the clients with support from the same proximity as the municipalities did. There appears to be agreement that any down sides of the transfers have been fully compensated by the advantages that include significant cost saving and a step towards the unification of processes across the country. Even though we have recently seen that some reforms introduced in social security have been revoked by the following government, the transfer seems to be undisputable now and no changes are foreseeable in the near future.

Devolution and decentralisation in social security: the situation in Germany

Stephan Rixen

1 A general picture of the system of social security and the administrative organisation

Social expenditure accounts for an approximately 30% share of Germany's gross domestic product. This demonstrates the importance that the welfare state has in Germany. The bulk of the population is insured in the various branches of social insurance (statutory health insurance, social long-term care insurance, statutory pension insurance, employment promotion [= unemployment insurance] and statutory accident insurance). Statutory health insurance in fact covers roughly 90% of the population, whilst long-term care insurance actually provides insurance cover for virtually the entire population.[1] Most people who are not covered by statutory health insurance are insured with the approx. 40 private insurance companies that cover medical expenses. In addition, tenured civil servants and judges, as well as public servants who have comparable status, are covered by a separate healthcare system consisting of government aid covering medical treatment and care of civil servants (*Beihilfe*), which covers part of the costs whilst the remainder is either paid for by the insured persons themselves, or is covered by private insurance. With the exception of statutory accident insurance, they are also not covered by social insurance in other respects; their old-age pensions are financed from tax revenue.

The public in Germany is highly interested in social policy issues. Such issues involve the question of how much inequality there is in society. Old-age pensions and unemployment benefits in particular, but also healthcare, attract public attention. The overall good level of social benefits provision has a conciliatory impact on society. Not to put too fine a point on it, a high level of social security increases internal security because it makes social unrest less likely and promotes people's satisfaction. This insight was drawn on at the dawn of the welfare state in Germany, when *Otto von Bismarck* took political responsibility for founding social

1. Anyone who has private health insurance must have private compulsory long-term care insurance as well, cf. section 23 and section 110 of the Eleventh Book of the Social Code (SGB XI).

insurance in order to tackle the Socialists at that time and win the workers over to the Monarchist State.

The 'social partners' – employers' associations and trade unions – continue to play an important role in social legislation down to the present day. Political decision-makers take their proposals and criticisms seriously. German political decision-making is very much orientated towards creating economic prosperity. Social policy projects are therefore generally assessed as to whether they impact on the economy, and if so then in what way. Major socio-political projects such as the introduction of 'basic security benefits for job-seekers' in 2005 have aimed to reduce the high rate of unemployment, and were intended to boost economic performance.

Most of the laws that are important for social security are summarised in the 'Social Code' (*Sozialgesetzbuch* – SGB), which has been in existence for some forty years and is gradually being added to by new materials.[2] A new Book is currently being prepared dealing with 'social compensation' (for the benefit of crime victims, for example) and bringing together various laws that have existed on this subject so far. The Social Code is currently made up of twelve 'Books'. Other laws which are not 'Books' forming part of the Social Code are equated to the 'Books', and are referred to as Special Parts.[3]

Social security in Germany is implemented by large numbers of authorities. Some of these form part of the Federation (the central state), whilst some are assigned to the *Länder* (the constituent states of the Federation), and others in turn operate outside the general administration, being run as independent organisational units (social insurance funding institutions) (see 3. below for details). The number of social insurance funding institutions has declined rapidly in recent decades, particularly as a result of mergers. Whilst there were for example roughly 1,800 statutory health insurance funds in 1970, this number is down to just over 100 today. The administrative picture for clients is highly diverse, and can even be confusing. The breakdown of responsibilities is highly complicated. Numerous responsibilities overlap, at least in part. It is often not possible to reliably determine which authority or which social insurance funding institution has primary or secondary responsibility. This is somewhat euphemistically referred to as a 'tiered system'. Changes could theoretically be made here, but this is virtually impossible in practice given that the authorities dealing with social security, and the social insurance funding institutions, generally block any fundamental changes. In certain areas, such as the law governing people with disabilities (Ninth Book of the Social Code – SGB IX), there are procedures which are intended to clarify the primary responsibility of an

2. Comprehensive overview by Ruland, Becker and Axer 2018.
3. Cf. section 68 of the First Book of the Social Code.

authority or social insurance funding institution,[4] but in practice this is often not successful, or at least is not achieved sufficiently quickly.

2 The state of devolution

2.1 Historical remarks

The Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland* – GG) came into force in 1949. The Basic Law is Germany's constitution. The word 'Constitution' is often used today as a synonym instead of the official term 'Basic Law'.[5] The Basic Law draws on historical models when it comes to matters related to social security. This applies in particular to social security, the basic structures of which were established at the end of the 19th Century. As has already been mentioned, social security is a political invention of *Otto von Bismarck* (Sachße and Tennstedt 1998; Stolleis 2003). The first foundation stone for the modern German welfare state was laid in 1883 with the 'Act concerning the Health Insurance of Workers' (*Gesetz, betreffend die Krankenversicherung der Arbeiter*).[6] Unlike in the United Kingdom for example, which follows the 'Beveridge Model',[7] it is social insurance that carries out essential functions of social security in Germany, albeit not all of them. Statutory accident insurance was founded in 1884 to compensate for the consequences of occupational accidents. This was followed in 1889 by disability and old-age insurance, which is now known as statutory pension insurance and whose primary task is to provide financially for old age at the end of a person's working life. Unemployment insurance was founded several decades later, in 1927. The legal basis for long-term care insurance, which deals mainly with the consequences of frailty that are typical of old age, was created at an even later date, i.e. not until 1994. The forerunners of today's social assistance, which goes back to care for the poor provided by the municipalities, and which originated in the Middle Ages independently of the Church's care for the poor, are much older.

Some sectors of the social security system are comparatively new. For example, it was not until the Weimar period that child and youth welfare (*Kinder- und Jugendhilfe*, literally 'assistance') (still referred to at that time as '*Jugendwohlfahrt*' [*Wohlfahrt* meaning 'welfare']) were able to develop a professional profile that was dis-

4. Cf. section 14 of the Ninth Book of the Social Code.
5. All the *Länder* (e.g. Bavaria, North Rhine-Westphalia) also have Constitutions. which are usually referred to as *Land* Constitutions.
6. The term 'welfare state' was displaced from the middle of the 19th Century onwards not least by the term 'social state', coined by *Lorenz von Stein*, which was positioned as a counter-concept to certain revolutionary or Socialist-type connotations of the word 'welfare'.
7. Named after *William Henry Beveridge*, who in 1942 submitted the Beveridge Report (usually so named after him) on behalf of the British Government. This report formed the basis for the establishment of the National Health Service.

tinct from general care for people in need. As has already been indicated, laws came into force in 2005 that created 'basic security benefits for job-seekers' (German Social Code Book II (SGB II)). These apply to persons who are unemployed but who do not yet satisfy the conditions for receiving unemployment insurance benefits, or who no longer satisfy them.[8]

2.2 *Constitutional setting*

The Basic Law refers to the social federal state (Article 20 para. 1 of the Basic Law) and to the social state governed by the rule of law (Article 28 para. 1, sentence 1, of the Basic Law).[9] The principle of the social welfare state (or social state principle) (King 2014) is derived from these provisions. This principle does not specify in detail how social security must be organised or what benefits may be claimed. According to the highly-prevailing opinion, this is a state goal, i.e. the state organs are obliged to pursue the goal of establishing social justice or social balance. 'Social' comes from the Latin word '*socialis*', which means 'together, belonging, belonging together' (Rixen 2008, 87; Rixen 2015, 304-305). The social welfare state must therefore make continuous efforts to ensure that people can view themselves as belonging, i.e. that they are not permanently marginalised and permanently denied the opportunity to develop their personality and take part in the life of society.

The Constitution does not specify in detail what resources the State is to deploy in order to achieve the goal. The principle of the social welfare state does not grant any (fundamental) social rights. When the Basic Law was adopted in 1949, the founders of the Constitution deliberately left out social rights, and limited themselves to 'classical' freedom rights which were intended to prevent interference on the part of the State. The underlying concern was that (fundamental) social rights were overly dependent on the form given to them by the legislature in order to become effective, and were therefore unable to provide robust protection against the State.

8. The law (Second Book of the Social Code – Basic Security Benefits for Job-seekers [SGB II]) is mostly referred to in the German public arena as '*Hartz IV*'. The word 'Hartz' refers to *Peter Hartz*, a former manager at Volkswagen, who at the beginning of the 2000s headed a commission set up by the German Federal Government which presented recommendations for reforming labour market regulation. These recommendations constituted the starting point for four Acts that were subsequently passed. The fourth and last Act which concurred with these recommendations (albeit only partially) is usually referred to by the political and media public as '*Hartz IV*', the Roman numeral 'IV' standing for the number four.
9. It should also be noted that Article 23 para. 1, sentence 1, of the Basic Law speaks of the 'social principles' to which Germany is committed as a Member State of the EU. Information on the constitutional setting by Currie 1994; Heun 2011; Kommers and Miller 2012; Robbers 2017; Kau 2019.

More recently, the Federal Constitutional Court has coupled the principle of the social welfare state with individual freedom rights (Rixen 2018). It has derived from Article 2 para. 1 of the Basic Law, containing general freedom of action, in conjunction with the principle of the social welfare state stipulations for shaping statutory health insurance when it comes to the treatment of life-threatening or comparably-serious illnesses. In addition, it has based its reasoning on Article 2 para. 2, sentence 1, of the Basic Law, containing the right to life and physical integrity, in conjunction with the principle of the social welfare state. The Federal Constitutional Court has deduced from Article 1 para. 1 of the Basic Law, containing the guarantee of the inviolability of human dignity, in conjunction with the principle of the social welfare state, a right to a guaranteed subsistence minimum. These rulings handed down by the Federal Constitutional Court do not define a specific level of benefits. Rather, they formulate stipulations for the legislative procedure, in particular with regard to how intensively the legislature must investigate and substantiate the relevant facts. It is primarily a matter of rights that are intended to guarantee a particularly careful legislative procedure. These are therefore not fundamental social rights in the sense of guaranteeing rights to precisely-defined benefits. It is a form of proceduralisation, given that rights related to procedures – or more precisely, rights related to the legislative procedure – are intended to ensure that the legislature takes situations that are of existential importance for people's lives particularly seriously.

The principle of the social welfare state must be implemented within the framework of the legislative and administrative competences that the Basic Law assigns to the Federation and the *Länder*. This principle is not a super principle that calls this system of competences into question. On the contrary, the principle of the social welfare state only works within the framework of the competences assigned by the Basic Law to the Federation and the *Länder*.

2.3 The division of competences between the layers of government

2.3.1 State structure

Germany is a social federal state (Article 20 para. 1 of the Basic Law), meaning that the country is organised along federal lines: It consists of one central state and 16 constituent states (the *Länder*). Although the words 'social federal state' indicate that social security is implemented within the framework of the Federal State, there is virtually no discussion in German constitutional law or political science as to how the concept of the social welfare state relates to that of the Federal State ('social federalism') (Cantillon, Popelier and Mussche 2011; Costa-Font and Greer 2013; Fierlbeck and Palley 2016). One reason for this may be that the *Länder* have virtually no legislative powers with regard to social security, and are primarily concerned with the implementation of the social security legislation that is enacted

by the Federation (see 3 below). The legal and political science debate in Germany is dominated by general reflections on the problems of the so-called political intertwining between the Federation and the *Länder*, not infrequently analysing blockades in decision-making processes, known as 'political interdependence traps'.[10] This often involves questions related to the financial constitution, i.e. the distribution of tax revenues between the Federation and the *Länder*, or what is referred to as the financial transfer, that is the balancing out of the varying financial capacities of the *Länder*. There are specific studies on the healthcare sector in particular (Döring and Paul 2010; Mätzke 2013; Busse and Blümel 2014), which has many connections with social insurance, and with statutory health insurance (Fifth Book of the Social Code) in particular, but which also concerns large numbers of other aspects (e.g. hospital planning, the law on medicinal products, infection protection, the law on the health professions). They demonstrate by way of example that behind the constitutional term 'Federal State' there lies a complex structure of influences, dependences and interactions.

2.3.2 Division of competences in social security

According to the German understanding, it is not only the Federation, that is the central state, that has the quality of a state, but the *Länder* also have such a quality. The latter are not merely sub-national administrative units of the Federation. From a comparative law and political science point of view, one may doubt whether the self-designation of the *Länder* as a 'state' is convincing, given that the main task of the *Länder* is to implement the law, i.e. to perform administration (more on this in a moment).

In accordance with Article 30 of the Basic Law, the exercise of state powers and the performance of state duties is a matter for the *Länder*, unless the Basic Law makes or permits other arrangements. According to the original idea of the Basic Law, the State's tasks are therefore primarily to be implemented by the *Länder*. In this vein, Article 70 para. 1 of the Basic Law provides that the *Länder* have the right to legislate insofar as the Basic Law does not confer legislative powers on the Federation. In fact, the Federation (see in detail Article 72 para. 1 and Article 74 of the Basic Law) nevertheless has power to legislate in many areas, with the consequence that the *Länder* may then no longer enact laws in this area (known as concurrent legislative power).[11] The legislative powers that the Federation exercises generally include competence for social security, including unemployment (Article 74 para. 1 No. 12 of the Basic Law), as well as for ensuring the economic viability of hospitals and the regulation of hospital charges (Article 74 para. 1 No. 19a of the Basic Law).

10. The German equivalent *Politikverflechtungsfalle* was coined by German political scientist *Fritz W. Scharpf*, see Scharpf, Reissert and Schnabel 1976; Scharpf 1985.
11. There are also matters that are under the exclusive legislative power of the Federation (Article 73 of the Basic Law), but these do not play a role in social security.

In accordance with Article 74 para. 1 No. 7 of the Basic Law, what is known as 'public welfare' (except for the law on social care homes) is among the 'concurrent legislative powers'. 'Public welfare' includes for instance all laws dealing with basic security benefits for job-seekers, social assistance or child and youth welfare.

The Federation must prove with regard to certain legislative competences, such as legislative competence for public welfare, that it is necessary for a provision of federal law to be handed down (Article 72 para. 2 of the Basic Law). This is the case if the provision of federal law is necessary in the interest of the State as a whole in order to establish equivalent living conditions within the territory of the Federal Republic, or in order to preserve legal or economic unity. These criteria are relatively strictly controlled by the Federal Constitutional Court, with the chances of success being best for the Federal legislature if it considers a law to be necessary because it serves to preserve economic unity within the Federal territory.

A phenomenon known as 'cooperative federalism' plays a role in the Federation's legislation. As has already been mentioned, one of the characteristics of the German model of federalism is what is known as 'political intertwining'. This also includes the problem that politicians mostly act at Federal and *Länder* level who belong to the same parties or whose parties are working together. This is another reason why the constitutionally-separate levels of political life are highly intertwined. That is why many decisions which are actually only to be taken by the Federation are coordinated in advance with those holding political responsibility in the *Länder*. Fundamental changes in social security, but also for example in basic security benefits for job-seekers or social assistance, de facto cannot be implemented without consulting with the *Länder*. The *Länder* are often formally placed in a position in which they can obstruct the Federation's legislative projects in the Bundesrat, a representation of the *Land* governments at Federal level,[12] if the interests of the *Länder* are not sufficiently safeguarded.

I can sum up by saying that most laws concerning social security are enacted by the Federation. The *Länder* can exert considerable political influence on important social security legislation, especially where the implementation of legislation threatens to impose financial burdens on the *Länder*. In the field of social security, moreover, the *Länder* usually only enact implementing legislation relating to organisational matters, or they regulate matters which have not been fully regulated by the Federation. For example, the *Länder* have enacted legislation on the visually impaired. These provisions supplement federal laws to provide additional cash benefits for people with visual impairments.

12. Cf. Articles 50-53 of the Basic Law.

3 The state of decentralisation

3.1 Constitutional setting

A special feature of the German model of federalism is regulated by Article 83 of the Basic Law. The *Länder* accordingly execute federal laws in their own right insofar as the Basic Law does not otherwise provide or permit. This arrangement is based on a particular understanding of the separation of powers. The intention is for the power of the Federation to be deliberately limited. Even though it may enact numerous laws, particularly in the sphere of social security, most of the laws are not implemented by the Federation itself, but by authorities of the *Länder*. The term 'executive federalism' has become established in political science for this role played by the *Länder*. It expresses the fact that the executive, i.e. the administrative implementation of the laws enacted by the Federation, is a job for the *Länder*.[13]

The Basic Law does not specify in detail which administrative level in the *Länder* is responsible for implementing Federal laws, and it is the *Länder* themselves that determine this as a rule.[14] Most questions outside the social security system, i.e. social assistance or child and youth welfare in particular, are assigned by the *Länder* to the lower administrative level, i.e. the municipal level, in particular the level of rural districts and 'non-district towns', that is the large cities. Another special feature of German federalism is the involvement of the municipalities in the implementation of provisions of Federal law. The municipalities have a limited right of self-government in certain areas. At the same time, however, they form part of the administrative structure of the *Länder*, and as such they may be called on by the *Länder* to implement Federal legislation.

Not all the *Länder* are subdivided into municipalities. The *Länder* Berlin and Hamburg only have 'districts', which are similar to municipalities but which, unlike municipalities, have no (limited) right of self-government. The *Land* Bremen has two municipalities: the City of Bremen and the City of Bremerhaven. The *Land* Bremen and the City of Bremen are however closely linked in administrative terms, something which is regulated in greater detail in the Bremen Constitution. Probably the most independent municipality in the Federal Republic of Germany is the city of Bremerhaven, which is located at the North Sea approx. 50 km northwest of

13. The Federation can create its own administrative authorities in specific areas that are important for the State as a whole (e.g. the military, the diplomatic service, export control, questions of Germany-wide economic regulation, for instance in cartel law). It goes without saying that the laws enacted by the *Länder* in their own areas of responsibility (e.g. police, school or university laws) are implemented by the *Länder* themselves.
14. Cf. Article 84 para. 1 of the Basic Law.

Bremen and is an exclave of the *Land* Bremen, and in turn is surrounded by the *Land* Lower Saxony.

There are some administrative peculiarities that apply to social security. The Basic Law (cf. Article 87 para. 2 of the Basic Law) permits the Federation to establish social insurance institutions under certain conditions. If the Federation does not set up such social insurance funding institutions, the *Länder* can establish them. This creates an administrative structure in parallel alongside the general administrative structure in the Federation and the *Länder*. These general Federal and *Länder* administrative structures are independent of one another, but the structure of the authorities is similar. At the top are the ministries (supreme *Land* or Federal authorities). These are followed by higher authorities that perform specific tasks which are important for the Federation or the respective *Land* as a whole (e.g. environmental protection). Then come intermediate authorities which perform tasks that are of regional importance. The lower administrative authorities carry out tasks at local level (the Federation has very few such lower administrative authorities; they exist, for example, in border control or customs, for which the Federation is responsible).

The special administrative structure of social insurance has nothing in common with this general administrative structure. Rather, there are a large number of legally-independent organisational units that perform social security tasks. These are not organisations under private law, but public-law entities which are part of the State but are separated from the general administrative structure and have a certain autonomy. Statutory health insurance, i.e. social insurance for health issues, is implemented by '(statutory) health insurance funds'. Statutory accident insurance (compensation for the consequences of occupational accidents) is implemented by 'statutory accident insurance institutions' (*Berufsgenossenschaften*). A nationwide social insurance funding institution is the 'Federal Employment Agency', which is responsible for unemployment insurance. The pension insurance institutions are responsible for statutory pension insurance, e.g. the 'German Federal Statutory Pension Insurance Scheme', the 'North Bavaria Statutory Pension Insurance Scheme' or the 'Westphalia Statutory Pension Insurance Scheme'. Although some of these social insurance funding institutions refer to a *Land* as part of their names, this does not mean that they are integrated into the general administrative structure of the *Land* in question.

This structure, which operates in parallel to the general administration in the Federation and the *Länder*, dates back to the foundation of the social welfare state at the end of the 19th Century. At that time, independent social insurance funding institutions were established, in particular the health insurance funds, the employment accident insurance funds (responsible for compensating for the consequences

of occupational accidents), and the pension insurance institutions. The Basic Law adopted this structure in 1949 (cf. again Article 87 para. 2 of the Basic Law).

A special system within social security is the 'basic security benefits for job-seekers' (German Social Code Book II (SGB II)). The Federation and the *Länder*, as well as the municipal level, work together on the basis of a special provision of the Basic Law (Art. 91e of the Basic Law). As has already been mentioned, these are unemployed people who have not yet worked long enough to be covered via regular unemployment insurance. This task had previously been assigned partly to the municipalities, and partly to the Federal Employment Agency as the agency responsible for unemployment insurance. In order to be able to perform the tasks better, the Basic Law permits cooperation between a social insurance funding institution set up by the Federation – the Federal Employment Agency – and the municipalities as part of the *Länder*. This constitutes an exception to the prohibition of mixed administration, as the Basic Law otherwise prohibits the combining of the different levels of administration. A special provision (Article 91e of the Basic Law) has therefore been introduced to allow this linking of different administrative levels in terms of basic security benefits for job-seekers. The direct tasking of the municipal level, which is permitted by this provision contained in the Basic Law, constitutes an exception.

3.2 Functional decentralisation versus territorial decentralisation

The multitude of authorities (including social insurance funding institutions) leads to a patchwork of functional and territorial responsibilities. In addition to the municipalities, which perform specific tasks (such as social assistance and child and youth welfare), there are special administrative units which also operate locally. For example, most health insurance funds have different offices in their areas of responsibility, and these enable them to maintain direct contact with clients at local level. Long-term care insurance funds, which are legally independent but closely linked to the health insurance funds in organisation terms, run advice centres which are also located at local level.[15] Elements of functional and territorial decentralisation are combined in the social insurance funding institutions in particular.

3.3 The powers of the local decentralised level

The principle of legality of administration applies to all authorities applying laws in the field of social security. This means that they are bound by the laws, which, as has been explained, are primarily enacted by the Federation. The municipal level

15. Cf. section 7a of the Eleventh Book of the Social Code.

has practically no role to play when it comes to legislation on social security. At most in the area of child and youth welfare, local by-laws may regulate issues that are more organisational in nature (e.g. registration for a day-care centre/kindergarten).

Laws can leave varying degrees of leeway, for example because the benefits for which they provide are not precisely defined; the authority can then determine the content more precisely by means of interpretation (cf. 3.3.1). The content of a benefit may also vary because different providers (especially health care providers) set different, permissible, emphases within the framework of the law (cf. 3.3.1). The (local) authorities' room for manoeuvre also depends indirectly on the financing of social benefits (cf. 3.3.4). Depending on how much money is available from taxes or from social security contributions, in particular discretionary benefits can be granted that are more or less generous.

3.3.1 Policy, determining of claims and delivery of services

The laws on social security define the content of social benefits with varying degrees of precision. When it comes to cash benefits, the conditions for granting the cash benefit and its amount are specified relatively precisely by law, such as benefits to secure one's livelihood as part of basic security benefits for job-seekers. In certain areas (such as the cost of accommodation, which is covered by basic security benefits for job-seekers), the quantitative amount of an entitlement is not determined by law. This indeterminacy is somewhat rare with regard to cash benefits. The sums to be paid for an old-age pension, for example, are also precisely defined by law, and the authorities have no room for manoeuvre. In long-term care insurance, too, the costs are only covered by the long-term care insurance fund up to a certain amount; the rest must be paid by the insured persons themselves.

The contents of the benefits in statutory health insurance are described in law, but what happens in detail very much depends on the respective healthcare provider, such as the physician. A committee – the Federal Joint Committee (*Gemeinsamer Bundesausschuss*), made up of representatives of the health insurance funds and healthcare providers (in particular physicians and hospitals) – adopts guidelines that define the content of the treatment more precisely. Contracts concluded by health insurance funds, or their associations, with healthcare providers or their associations also specify the content of a treatment (e.g. physiotherapeutic treatment). The generally-accepted state of medical knowledge applies in other respects. It leaves a certain amount of leeway for healthcare providers, as long as guidelines or contracts do not stipulate otherwise. On the other hand, the health insurance funds base their approach on a specific understanding of evidence-based medicine, which sets limits on the subjective assessment of the healthcare provider, and of physicians in particular.

In child and youth welfare, the law describes the content of the benefits in a very open manner. The law thus permits the further development of the contents of benefits in the event of changes in pedagogical views and methods. The measures concerning integration into employment, i.e. the elimination of unemployment, are also regulated in a relatively undetermined manner. The relevant provisions of unemployment insurance and basic security benefits for job-seekers are, as a rule, discretionary provisions that leave the authorities a great deal of room for manoeuvre.

Finally, the content of benefits can vary, depending on whether or not a person has a disability. Additional benefits in accordance with the Ninth Book of the Social Code (SGB IX) can then be added in addition to the usual benefits.

3.3.2 Local authorities and third party service delivery

Contracts concluded between funding agencies and healthcare providers play an important role in many areas of social insurance (especially in statutory health insurance and long-term care insurance), but also in social assistance and child and youth welfare (Rixen 2005). This also applies to local authorities, but not only to them, where they are involved in the implementation of social security legislation. As has already been mentioned, these contracts define the content of the benefits more precisely; quality assurance measures are agreed, as is the remuneration. The authorities and the social insurance funding institutions have considerable room for manoeuvre here. However, it should be borne in mind that the authorities rely on the cooperation of the healthcare providers. For example, the health insurance funds have a service guarantee which obliges them to ensure that there are sufficient doctors, hospitals and other healthcare providers to care for insured persons. As far as possible, negotiations must therefore be conducted in such a way that care is not jeopardised. This in turn restricts the scope for manoeuvre.

A knowledge of the methods of cooperation between governmental and non-governmental bodies is essential in order to gain an understanding of the German social welfare state. We speak of corporatism. What is meant by that is that many questions related to everyday practice are regulated by associations (a synonym that is no longer in such regular use today is 'corporations'). For example, in social assistance or child and youth welfare, the State concludes contracts with the providers of social benefits regulating not least the details of the content of the benefit. The idea behind this is that there are many issues on which a society does not hold a uniform view, given that we live in a pluralist society. This can be nicely illustrated with regard to child and youth welfare law, which involves the education and care of young people. The educational ideas and methods differ, depending on the

values that are considered relevant in this respect.[16] This plurality of educational concepts is to be taken into account by authorising as many different providers of social benefits as possible. The involvement of such private providers, in particular from the church or charitable sectors, is intended to ensure plurality in the implementation of social benefits.

The idea of corporatism makes it clear that government bodies, be they the municipalities in the area of social assistance or the health insurance funds when it comes to statutory health insurance, do not have to provide the services themselves. They have a responsibility as a guarantor (*Gewährleistungsverantwortung*), but do not necessarily have responsibility in terms of fulfilment (*Erfüllungsverantwortung*). This means that the individual benefits, such as those provided as part of social assistance, child and youth welfare, statutory health insurance, long-term care insurance and accident insurance, are not provided by the government agencies themselves, or not primarily (this contrasts with a state social or health service), but that private companies or charities that work on behalf of the State provide the benefits that the State is obliged to provide to the insured persons or persons in need of assistance, and which it finances for them. The situation is somewhat different when it comes to pension insurance, since cash benefits (e.g. old-age pensions) form the main focus here. Pension insurance is also responsible for medical rehabilitation where the aim is to restore fitness for work. As a very general rule, this is provided in hospitals that are run by statutory pension insurance itself.[17]

3.3.3 Supervision

The *Länder* (in most cases the *Länder* Ministries responsible for social security) have a role to play as supervisory authorities if no social insurance funding institution has been set up at Federal level, given that the Federation is the supervisory authority in such instances. The Federal Insurance Office (*Bundesversicherungsamt*), which is not responsible for *private* insurance, is responsible for this.[18] The *Länder* have general responsibility for supervising the municipalities. Depending on the task performed by the municipality, supervision is limited to legal supervision pure and simple, which only verifies the legality of the performance of the task. In its guise of 'specialist supervision', supervision can also extend to the expedient fulfilment of the task. How far supervision extends depends on the laws of the respective *Land*.

16. Cf. section 3 subsection (1) of the Eighth Book of the Social Code: 'Youth welfare shall be characterised by the diversity of providers of different value orientations and the diversity of content, methods and forms of work.'
17. Statutory accident insurance also operates its own hospitals, which specialise in treating certain occupational accidents, such as victims of fire and persons with similarly serious injuries.
18. Larger private insurance companies are supervised by another Federal authority (the Federal Financial Supervisory Authority – *Bundesanstalt für Finanzdienstleistungsaufsicht[BaFin]*). Smaller private insurance companies are supervised by the *Länder*.

3.3.4 Financing

The financing of social security is regulated almost exclusively by laws that are handed down by the Federation (Rixen and Kluckert 2018). In social security, there are special social security contributions which, in the case of employees, are typically shared between employees and employers. Only statutory accident insurance is financed by the employers alone. The amount of the contributions is determined by Federal law. Statutory health insurance has a special system of financial equalisation ('risk structure equalisation'), which balances out the health insurance funds' different levels of financial resources on the basis of the probability of their insured persons falling ill (older people for example are regarded as more expensive 'risks'). The social insurance funding institutions do not have any room for manoeuvre when it comes to setting social insurance contributions. There is a certain exception in statutory health insurance, where the social security contribution can be reduced if, for example, a person has not claimed any benefits for a prolonged period of time. In addition, each health insurance fund can set additional contributions if it cannot cover its expenses by other means. Social security contributions are topped up in certain areas – such as pension insurance, but also statutory health insurance – through state subsidies coming from tax revenues.

Social security systems outside the social insurance system are primarily financed through taxation (e.g. social assistance or child and youth welfare). All areas of social security provide for individuals to make co-payments, i.e. when it comes to statutory health insurance, certain procedures have to be paid for at least in part by the patients themselves (e.g. dental care). This also applies in child and youth welfare, where parents have to make a financial contribution towards certain (e.g. residential) measures (e.g. a stay in a home), provided that this is financially justifiable.

3.3.5 Client involvement

In the area of tax-financed social security, clients have practically no way of influencing administrative procedures outside a specific procedure in which they apply for a benefit. The situation is different in social security. A 'self-government' system operates in pension, health and accident insurance, in which primarily representatives of employers and insured employees participate (employees form the largest group of insured persons in all branches of social insurance). This structure can be traced back to the dawn of the German welfare state, and was intended to place workers in a better position and to also involve employers in financing social security in order to achieve this goal. The representatives in the self-governing bodies are elected by the insured persons every six years. Voter turnout is generally not high because most insured persons are not aware of these elections. Many insured persons also wonder what is the point of self-government, given that it does not take any important decisions – such as on the content of benefits or the

amount of contributions. Patient representatives in statutory health insurance do sit on the Federal Joint Committee (*Gemeinsamer Bundesausschuss*), but only in an advisory capacity and without any voting rights.

3.3.6 Decentralisation paradox?

There are no signs of a decentralisation paradox in Germany. Since the beginnings of the welfare state at the end of the 19th Century, social security laws have been implemented on a decentralised basis, i.e. many state (including municipal) administrative bodies are involved, as are numerous social insurance funding institutions. As was stated above, this has not led to legislative power being shifted to the decentralised units. There is room for manoeuvre from an administrative point of view, but this is generally limited from the outset by relatively strictly-formulated Federal laws. In other words, it is essentially a question of executive decentralisation without a great deal of autonomous power.

4 The state of the debate and future perspectives

What are the characteristics underlying German social federalism? First of all, it is important to distinguish between the different functions performed by the State. The Federation enacts most social security laws. These laws are very largely implemented either by the *Länder* (and in turn by the municipalities), or (as far as social insurance is concerned) by the social insurance funding institutions, which exist alongside the remainder of the administrative structure at Federal and *Länder* level. This means that the German model of social federalism is in particular a form of executive federalism (cf. 3.1 above on this point), given that Federal laws are implemented by numerous authorities that are not controlled by the Federation. The authorities, including the social insurance funding institutions, do not as a rule have very much scope to define the content of the benefits.

The Federal Constitutional Court has stressed for the statutory health insurance sector that the legislature could also replace the many health insurance funds with a Federal authority that would take over their tasks (Rixen 2009, 37 (fn 71)). This ultimately applies to all social insurance funding institutions. The original rationale behind the introduction of social insurance funding institutions, namely that they provide a certain diversity of benefit content due to the limited degree of self-government granted to them by law: Diversity through decentralisation – is being increasingly hampered by narrowly-defined laws.

This reflection can be transferred to the German model of social federalism as a whole: The implementation of the laws on social security confirms the long-described trend towards a 'unitary federal state' (a phrase coined by the constitutional law teacher and former judge at the Federal Constitutional Court *Konrad Hesse*)

(Hesse 1984). What this refers to is a model of federalism in which the differences between the constituent states increasingly diminish, whilst a unitary state is surreptitiously created. The social federal state in Germany is implemented on a decentralised basis. That said, the administrative implementation of social security legislation does not leave a great deal of room for diversity. Uniformity reigns behind a façade of decentralisation.

Devolution and decentralisation in social security: the situation in Hungary

Gábor Juhász

1 A general picture of the social security system and its administrative structure

In the pre-war period, Hungary was co-state to Austria and thus started to create a social insurance system along Bismarckian lines. Social insurance was a complexity of workers' insurance schemes. Agricultural workers, self-employed people and even better paid highly-skilled workers (almost 70 percent of the total workforce) were excluded from these insurance schemes.

As a first step, a health insurance scheme was set up in 1894, followed by the introduction of a work accident scheme in 1907. In 1912 the government established a non-contributory child benefit scheme for which only public servants and other categories of public employees (for example railway men) were eligible. The Bill on retirement pension and invalidity insurance was adopted by the Hungarian Parliament in 1928. The pension scheme also included death benefits. No efforts were made to create unemployment insurance.

Strangely enough, the communists left the structure of the social insurance system unchanged because it suited their aim to reward special groups (workers employed in nationalised companies and socialist cooperatives) with generous benefits and to punish those who tried to preserve their economic independence (smallholders, artisans etc.) with exclusion from the schemes. In the sixties, social democratic reforms and forced full employment made coverage in the schemes almost universal.

In the pre-war period, local authorities were required by law to provide social assistance for those who were born in their territory. Local authorities enjoyed considerable leeway in adopting regulations regarding the institutional framework of and the eligibility rules for social assistance. Using place of birth as a basis for the competence of local authorities made the operation of social assistance as a scheme extremely difficult. Needy people who did not live in their place of birth typically applied for support in their place of residence. If the municipality of residence provided assistance for these people, it could expect to have its costs reimbursed by

the local authority of the beneficiary's birthplace. However, there were many complaints about unpaid reimbursements and so local authorities only provided assistance to those people born and living in their territory. This highly complicated and ineffective system of social assistance collapsed in 1920 when Hungary lost 2/3 of its territory. Disannexed municipalities were no longer in a position to reimburse social assistance provided in Hungary to people born in their territory. Hungary had, after all, become a foreign country.

Market-oriented reforms in the early 1990s contributed to making services and benefits more closely related to contribution payments. They also fostered a decrease in elements of solidarity in the system and a partial privatisation of health and pension schemes.

In Hungary, both the centralised and decentralised administration had a rich tradition in social security. Path-dependency reinforced the centralised orientation of social insurance schemes as well as the decentralised direction in social care and assistance. This arrangement was recently subject to some change when administrative units were set up at district level and a vast number of administrative duties were transferred to them from local governments.

2 The state of devolution

2.1 Historical remarks

The Hungarian Kingdom was founded in 1000 AD by king Steven I. In the 11th century, the territorial system was established together with central administration by the counties. By the 15th century, the central administration had tasks relating to defence, economic management and judicial functions. In the first half of the 16th century the Ottoman advance broke the Hungarian Kingdom into three parts: the Turks occupied the middle of the country and the remaining Hungarian Kingdom, suppressed to the North-western part of the country, including the relatively autonomous Croatian lands, fell under Habsburg rule. In the Eastern part of the country the Principality of Transylvania was set up, dominated by Hungarian noblemen. After the expulsion of the Turks, the Habsburg emperors were reluctant to unify the country's fragmented administration. They maintained the separation between Hungary and Transylvania not only in constitutional but administrative terms as well and they also created a special administrative zone in the southern frontiers of the Hungarian Kingdom. In 1848 the revolutionary Parliament made efforts to unify the country and its administration but without success. The Austro-Hungarian Compromise of 1867 offered a solution to the problem of fragmented administration: Austria and Hungary became co-states with a limited scope of joint administration covering financial, foreign and military affairs. Hungarian jurisdiction was extended to Transylvania as well as to the southern frontiers and thus, Hungary developed a unified system of public administration.

2.2 Constitutional setting

Hungary did not have a written constitution until 1949 when the Communist-dominated Parliament adopted a Stalinist style constitution which declared the unity of powers. The text of the Constitution did not explicitly state this, but the People's Republic of Hungary remained a unitary state and the territory of the country continued to be divided into counties, towns and villages. At lower levels of public administration, regional and local councils were established and tasked with achieving the goals set by the central administrative units. In theory, regional and local councils could ensure the realisation of regional and local objectives, but the tasks assigned to them by the central units left little room for doing so.

The new constitutional setting elaborated in 1989 made it possible to create municipal and county-level self-government. Municipal self-governments were set up in villages, towns and districts of bigger cities. Each county has its self-government as well as Budapest as a capital city. Both the Constitution and its substituent Fundamental Law declares that the fundamental rights of local self-governments are equal, but their duties may be different.[1] Decisions of municipal self-government and the self-government of the counties can only be reviewed for legal reasons.[2]

2.3 The division of competences between the layers of government

In Hungary, the Parliament decides about the competences of the central government and the municipalities. Hungarian laws prohibit the transfer of responsibilities from one administrative unit to another. Thus, the central government cannot take over tasks from the counties and municipalities without making an amendment to the Law on the Tasks and Duties of Local Governments.[3] However, local governments can take over specific tasks from the central administration on a contractual basis.

Municipalities and counties are entitled to receive support from the state budget for the performance of their necessary tasks as well as for the functions they take over by contract. Local self-governments also have a right to undertake tasks that do not fall within the competence of other bodies. If local self-governments do so, they are expected to finance these activities themselves.

1. Article 43 of the Constitution of the Republic of Hungary.
2. Article 44/A (1) of the Constitution of the Republic of Hungary, Article 34 (4) of the Fundamental Law of Hungary.
3. Act 189 of 2011.

2.3.1 *State structure (i.e. federal, confederal, unitary)*

After the collapse of the Austro-Hungarian Monarchy, Hungary became a unitary state. The traditional administrative division of the country into counties, towns and villages was maintained.

2.3.2 *Division of competences in social security*

The social welfare system has several subsystems. Based on the diversity of the funding sources, Fazekas makes a distinction between four subsystems. Benefits financed from tax revenue include family benefits and various types of social assistance. Social insurance covers the state health and state pension insurance schemes. Labour market insurance covers labour market programmes and provisions for the unemployed. Municipalities are responsible for providing social assistance to those in a crisis and for the provision of primary personal social services (Hoffmann 2015, 47).

The administration of social security is characterised by an active involvement of the central government. The minister of human capacities is responsible for regulating family benefits, for the protection of children and youth, for the provision of those who are permanently excluded from the labour market or who are in need for some other reason. The minister is also responsible for the rehabilitation of the disabled and for the benefits to be provided to them as well as for the sectoral administration of personal social services. He/she also directs the central offices of the pension and health insurance schemes as well as the National Office for Rehabilitation and Social Affairs. In the performance of these tasks, the minister takes the opinion of advisory bodies into consideration. It is the task of the minister of national economy to develop employment policy and to provide cash benefits for people registered as unemployed as well as to improve the protection of workers and to ensure their safety at work.

2.3.3 *Local responsibility or solidarity between local states / regions*

The legislation defines the tasks and duties of municipalities which include the provision of certain types of social assistance and social care. Municipalities are entitled to budgetary or other financial support proportional to the performance of their mandatory duties.[4]

In practice, the costs of the municipalities' social tasks are not calculated on a fixed basis but determined by budgetary considerations. Therefore, the state budget rarely reimburses the total amount that municipalities need to spend to perform their duties. In exchange for underfinancing, the law empowers municipalities to issue local decrees in which they can define the exact conditions for eligibility to benefits at the local level. In this way, municipalities can influence the number of welfare recipients and can thus keep control over their budget. Apart from these

4. Article 34 of the Fundamental Law of Hungary.

shortcomings, financial grants from the state budget contribute to an equal distribution of financial burdens between the municipalities since the formula for calculating the grants takes the differences between the financial situation of local governments into account.

3 The state of decentralisation

3.1 Historical overview

The territorial administration had a dual character in the middle ages: counties were governed by the nobility and the executive body of the state administration. Counties also had judicial, regulatory, administrative and taxation rights and a right to exercise control over and to resist the provisions of the central administration. Royal cities were granted municipal authority privileges under which their citizens could manage their affairs as a collective right. Other cities and the villages had very limited right to self-government. The Muslim invasion in the central areas of the country and the patriotic wars against the Turks conserved the feudal system of public administration until the end of the 17th century.

Western-style administrative reforms started in the 1720s when the Habsburgs managed to consolidate their rule in Hungary. They set up new administrative units of central administration called 'dicasterium' where professional bureaucrats were employed. In contrast to the centralising aspirations of the Habsburgs, counties became the centres of national resistance in the first half of the 19th century. After the fall of the 1848/49 War of Independence, efforts to centralise public administration became more intensive. Building the system of deconcentrated state administration organs intensified in this period. The underdevelopment of local democracy played an essential role in reducing the sphere of authority of municipalities. In the interwar period the tasks of the territorial administration were gradually taken over by units of the deconcentrated public administration directly subordinated to the central government.

Coming to power in the late 1940s, the Hungarian Communist Party enforced the Leninist concept of the unity of power and thus a single centre, the Council of Ministers, controlled the entire administration relying on the operation of a large number of ministries and bodies with national authority. The Soviets' approach eliminated the autonomy of counties and municipalities and replaced it with a centrally managed hierarchical administrative system (Pálné Kovács et al. 2003, 47-53).

As a reaction to the extreme centralisation of administration during the communist period, the renewed Constitution of the Hungarian Republic declared the right of the community of voters living in local municipalities and counties to self-government. It was extremely difficult to get local governments to reflect the organisational aspects of public administration. Considering the autonomy of local communities as a constitutional value, the amendments to the laws on local govern-

ments and their powers required a qualified majority in the Parliament. In the new system of public administration, each municipality was given the right to form a local government regardless of its size while, on the other hand, the law-maker delegated major administrative tasks and duties to them. By the mid-1990s 3100 municipalities had formed local governments, of which one-third had fewer than a thousand inhabitants. Initially, the law did not distinguish between the tasks allocated to the municipalities, which had a catastrophic impact on the performance of smaller local governments lacking the material as well as the human resources to implement their duties. As far as the administration of social security were concerned, excessive decentralisation had adverse effects on the provision of social services because smaller local governments were unable to provide the services the laws required of them. In the late 1990s Parliament started to delegate administrative tasks to local governments according to their size.
In 2010 FIDESZ, the Hungarian Civic Party, won more than two-thirds of the seats in Parliament. This opened the way for administrative reforms. Consequently, district level administrative units were established which took over tasks from the municipal level. District Offices became part of a deconcentrated state administration subordinated to Government Offices operating at county level.

3.2 Constitutional setting

It was the Stalinist Constitution of 1949 that first proclaimed social rights and declared them to be of paramount importance. According to the text of the Constitution, civil and political rights were to be 'exercised in the interest of socialist society'. This meant these were practically impossible to enforce. As a consequence of this inability on the part of citizens to exercise civil and political rights to support their claims for social protection, social rights were merely virtual rights.
During the political transformation started in the late 1980s, guarantees for civil and political freedoms were given preference over the constitutional protection of social rights. The negotiating parties agreed on the incorporation of social rights in the Constitution at the very last stage of the National Round Table negotiations. Hurrying in the formulation has had adverse effects on the accuracy of the relevant text which has caused many difficulties for the Constitutional Court when it has tried to interpret the regulation on social rights.
The Constitution had three articles in this respect. Article 17 formulated the state's commitment to 'provide support for those in need through a wide range of social measures'. Article 70/E (1) declared that the citizens of the Republic of Hungary 'have a right to social security; they are entitled to the support required to live in old age and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own'. The second section of the article outlined that the state should 'implement the right to social security through the social insurance system and the system of social institutions'. Thirdly, Article

70/D (1) declared that 'everyone living in the territory of the Republic of Hungary has a right to the highest possible level of physical and mental health'. Article 70/D (2) added that the state should implement this right through the organisation of safety at work, healthcare institutions, medical care and by providing regular physical training.

For two decades, the Constitutional Court kept legislation under strict control. However, as far as social rights were concerned, the Court has never exploited the potential of its power: social rights were declared state objectives outlining the duties of the state. The Constitutional Court declared that from a constitutional point of view, the state has not fulfilled its obligations if there are no benefits at all available in any areas of the country or relating to specific risks. The constitutionality of social legislation was judged by references to the rich tradition of interpretation of the right to property and the right to equal treatment as well as on the implementation of various constitutional principles regarding social rights. Even this limited approach could be used quite effectively to set the boundaries of governments action. Contributory benefits enjoyed similar protection with regard to property rights. The Constitutional Court started to refer to the constitutional doctrine of vested rights and legitimate expectations with regard to the protection provided by non-contributory benefits. According to this approach, the nearer is the possibility of exercising a right, the stronger is the constitutional protection of them as vested rights.[5]

Based on the principle of equality before the law, the Constitutional Court acted against all forms of discriminatory social legislation and annulled dozens of local government decrees. In some cases, the Court applied the principle of the rule of law, for example in instances where the regulations of subsidiary legislation contradicted the regulations enacted at a higher level in the legal system.

The illiberal turn in Hungarian politics contributed to paradigmatic changes to the constitutional protection of social rights. In 2011 the Constitution of the Republic of Hungary was replaced by the Fundamental Law of Hungary. The new legal setting sharply reduced the powers and the scope of the interpretative activity of the Constitutional Court, which lost its competence to review laws related to the implementation of the central budget. Consequently, a considerable part of social legislation has become outside the control of the Constitutional Court. Several amendments to the Fundamental Law are aimed at preventing the Constitutional Court from coming to conclusions opposing the government's will: Article XIX (4) excludes the reintroduction of the mandatory private pension scheme, Article XX (3) prevents the Constitutional Court from declaring the laws and local government decrees stipulating habitual stay in public premises unlawful as unconstitutional.

5. Decision 43/1995. (VI. 30.) of the Constitutional Court.

The Fundamental Law declares that 'everyone has a right to physical and mental health'[6] but this provision does not help to develop constitutional protection for the right to health further because the next paragraph identifies the content of this regulation with the state's duty to maintain the healthcare institutions. Article XIX (1) declares that 'Hungary shall make efforts to provide social security for its citizens'.[7]

Article XXII of the Fundamental Law sets out the obligation of the state to make efforts to provide decent housing and access to public services for everyone. The second paragraph of this Article mentions local governments as agents that shall, together with the State, 'contribute to creating decent housing conditions by making efforts to ensure accommodation for all persons without a dwelling'.[8]

3.3 Functional decentralisation versus territorial decentralisation

Hungarian administrative law recognises functional decentralisation of administrative tasks, especially in fields where executive decisions concern issues regarding professional ethics as well as issues in respect of which decision-making requires extra-legal knowledge. The application of professional ethics forms an integral part of the work in various professional chambers. There are also other specific public bodies where administrative decision-making is conditional on professional considerations. However, apart from a period between 1991-1998 when independent and publicly elected management boards directed the operation of social insurance funds, this approach to social administration has never become fully effective. (The government abolished pension and health insurance boards and placed the administration of state pension and healthcare funds under ministerial control in 1998) Compared to functional decentralisation, territorial decentralisation is much more popular in social security administration: the administration of social allowances has been the responsibility of local governments acting as decentralised units for almost two decades.

3.4 The powers at local decentralised level

The main pillars of social security (pension, health and employee insurance as well as a complex system of family benefits) are administered centrally, while local municipalities have a decreasing share in the administration of social care and social assistance. The Act on Local Governments regulates the tasks and the competence areas of local governments. The Act requires local governments to perform

6. Article XX (1) of the Fundamental Law of Hungary.
7. Article XIX (1) of the Fundamental Law of Hungary.
8. Article XXII (2) of the Fundamental Law of Hungary.

the functions of providing child protection services and benefits as well as social care services and benefits.[9]

The law does not grant local governments an exclusive power to act; sectoral laws define their actual tasks and the division of responsibilities between central administration units (primarily district offices) and local municipalities. In contrast to the post-socialist period when the provision of a wide range of social assistance and social care services was the responsibility of the local municipalities, the administrative reform significantly reduced their competences in 2013. Local municipalities remained responsible for the provision of essential social services like family support, meals and home care, temporary social care and minor social assistance. The new legislation delegated the responsibility for providing social assistance and residential care to District Offices. Within their competences, local municipalities are free to create their own rules on how to provide support.

3.4.1 Policy

Units of central administration have some room to set their own policy rules, although when they do so, this is mainly based on the interpretation of legal rules. On the other hand, a majority of municipalities are required to formulate their own 'social policy' because the law says that municipalities with more than 2000 inhabitants are to plan for the provision of personal social services.[10] Each municipality has a legal obligation to define the rules of eligibility for local benefits and services as well as to adopt a regulation on their budget, setting out the funding sources and the allocation of these funds to local social policy.

3.4.2 Determining claims and providing services

Due to the 2013 public administration reform, local municipalities have only limited decision-making powers and service providing responsibilities. Between 1990 and 2012 decisions on claims for means-tested benefits and services were referred to the competence of municipalities and county level self-governments. This created inequality with regard to the level of the benefits and the quality of the services as well as access to these. In response to this problem, Parliament started to strengthen the normative nature of social legislation by defining ever more precisely the entitlement to and the content of benefits and services. This move reduced the discretionary power of the administration to a minimum and at the same time prevented the implementation of local preferences in the provision of services. Even though these steps were suitable for standardisation, they had the adverse effect of making the administrative staff of the local self-governments act as agents of the central administration. It was only in 2012 that Parliament provided a satisfying answer to this problem by rearranging the competences with

9. Article 13 of Act 189 of 2011.
10. Article 92 (3) of Act 3 of 1993.

regard to the provision of means-tested benefits between self-government and the central administration. Responsibilities for the provision of most of the cash benefits as well as residential care services were delegated to various units of central administration. Only local support as a cash benefit and essential social services remained within the competence of local governments.

3.4.3 Local authorities and third-party service providers

The recent system of social security was formulated in the 1990s when marketisation was an integral part of the process of 'regime change'. It was also an era when the New Right's ideas about marketisation became extremely popular in political thinking. As a result, the legislation facilitated the involvement of private institutions in the provision of public services. At first ancillary services such as cleaning, laundering, operational services, IT support etc. were contracted out. Later, the creation of quasi-markets contributed to the increased involvement of private providers in the core elements of social and health services.

Service providers need a license issued by the competent authority and a contract with the relevant fund (Health Insurance Fund, Employment Fund etc.) or body to be paid for their services. Holding a license will not prevent private institutions from offering their services to the customers on a contractual basis.

The competent authorities are responsible for the provision of the services and they can choose whether to set up and maintain institutions to provide the services or to conclude a contract for the provision of services with a private institution. Laws regulate the details of the terms of the contract.

3.4.4 Supervision

As far as the supervision of decentralised units of public administration is concerned, their autonomy has always caused problems in Hungary. The autonomous status of local and county self-governments presupposes that supervisory bodies can control only the legality of their actions. From the mid-90s to the first decade of the new Millennium the number of units (3185 municipal self-government) and the multidimensional character of their tasks prevented the development of an efficient system of supervision for these units. In theory, Regional Government Offices had the responsibility to control the activities of decentralised units. Local self-government had to send all their decrees to the competent RGO to for legal control. However, the RGOs could neither systemise nor check the tens of thousands of local regulations they received. Respecting the autonomy of municipal and county self-governments, the RGOs did not have the competence to annul the unlawful acts of municipalities, but instead they had to initiate a lawsuit against them. Courts could invalidate the unlawful actions and they could order local self-government to start a new procedure. In some well-documented cases, even the court judgement could not prevent local decision-makers from repeating the acts that had already been declared unlawful. Administrative reform in the early 2010s

introduced changes to this situation because it radically reduced the competences of local self-government. The new Law on local self-government[11] expanded the powers of the RGOs to include the supervision of the activities of local governments. As a result, the RGOs have the power to fine local governments when:

- they fail to issue local legislation
- they fail to submit their legislation or administrative decisions to the RGO
- they fail to fulfil their obligation to provide public services
- they repeatedly violate the same statutory requirement.

3.4.5 Financing

Municipal and county self-governments are free to use their economic resources and they are entitled to the necessary support and assets for the performance of their duties. This means that they are entitled to an annual base rate for financing their social activities, which is calculated on the estimated number of beneficiaries, or in the case of complex personal social services based on the estimated number of professionals employed in the institution providing the services. Local governments are free to grant cash benefits and can also offer advanced level services if they have the resources to finance these.

3.4.6 Client involvement

A client involvement scheme has been set up for long-term residential care under which the service provider is obliged to define the rules according to which stakeholders (clients, their relatives, the staff of the residential care unit and the maintainers's representative) can establish and operate an interest representing forum. The forum has the right to give an opinion on the professional programme, the annual work plan, the house rules and the information leaflets issued by the institution. It may also request information on the provision of services and initiate action. The forum has the right to hear clients' complaints and it can call the head of the institution or even the competent authorities for action to be taken. Clients also have the right to establish an independent organisation to represent their interests.

4 The state of debate and future perspectives

Since 1920, when Hungary split from the joint monarchy with Austria and became a unitary state, losing almost 70 percent of its former territory, devolution has not been the subject of debate. This cannot be said with regard to decentralisation, which has always been the subject of scientific and political debates. In these debates it is often argued that centralised administrative systems are too rigid and unable to respond to the challenges of their rapidly changing environment. In early 1990, in contrast to the over-centralised system of state socialism, decentralisation

11. Act 189 of 2011.

was identified with a more democratic and effective way of using power. It was assumed that decentralisation had the potential to increase the responsiveness of social administration to newly arising social problems and that it might be better able to allocate local human and financial resources. Due to these arguments, social assistance and the provision of social and health care services has become the responsibility of municipal and county governments. On the other hand, there were genuinely rooted traditions of managing social insurance schemes centrally which overwrote these considerations about the advantages of decentralization.

After experiencing the shortcomings of locally administered services, criticism of decentralisation started to increase in the mid-1990s. Counter-arguments centred around the inability of the smallest municipalities to carry out their tasks efficiently and sufficiently. (In 2010, 55 percent of the municipalities with self-government had less than 1000 inhabitants.)

Small municipalities were often unable to meet the minimum professional standards for running the services and one-third of all municipalities failed to provide the services they were obliged to offer. The lack of human and financial resources also had damaging effects on the quality of the services. In 2002 the government initiated a reform programme for social legislation and social administration but the new Prime Minister discontinued it in a preparatory phase in 2004. Meanwhile, expertise that generated during the project contributed to the rethinking of the balance between centralisation and decentralisation in social security administration. The creation of District Offices as deconcentrated units at the medium level of public administration enjoyed considerable support from administrative and social policy experts who also recommended to make DOs responsible for the administration of the most important social benefits and services. Municipalities could have retained the power to deal with discretionary benefits (primarily crisis support) and to organise personal social services where local knowledge might have been a key (home help, family help). Proponents of the proposed structure assumed that the state should facilitate smaller municipalities in performing their tasks in jointly financed service centres (Hoffmann and Krémer 2005). However, in the absence of the necessary parliamentary support, the government failed to implement these plans. The recommendations had still some implications when the government started to reduce the discretionary power of municipalities and to give them financial incentives to create joint service centres in 2007.

In 2010 the government announced a comprehensive reform plan in public administration and implemented it fairly efficiently. By 2013 District Government Offices were set up and took over most of the tasks of local municipalities. The tasks of local municipalities have been reduced to the provision of basic personal social services.

The next step in structural reforms was the creation of a more streamlined and integrated public administration with increased efficiency and transparency. This phase of administrative reform started in 2016 and resulted merging the adminis-

tration of social insurance and universal benefits. The Central Administration of the Pension Insurance Fund and the Health Insurance fund ceased to exist and the newly created integrated office merged with the State Treasury, which is an independent legal entity under the supervision of the minister for the economy (Gál 2016, 1). Since the current structure of public administration is the culmination of a reform process that lasted for almost two decades, one may not be surprised that currently there are no plans for further reform in Hungary.

Devolution and decentralisation in social security: the situation in Italy

Mario Battaglini

1 A general picture of the system of social security

Italy's welfare is comparatively ineffective in reducing poverty and social exclusion because of its conservative-corporatist nature and its Southern-model traits. What is more, Italy's 'n-worlds of welfare regionalism' with regard to social assistance and healthcare raise important issues in terms of equity. This is due to the impervious path of defining and implementing 'essential levels', on the one hand, and the striking differences at the meso-level of government with regard to economic development and institutional performance, on the other. Such shortcomings, particularly in terms of equity with regard to healthcare and social assistance, are of primary concern in the Italian context since it is exactly in these policy sectors, respectively devolved to shared and exclusive regional competence, that Italy's welfare could play a more incisive universalist role. By contrast, the heterogeneity that lies therein has grave consequences in terms of a fragmented social citizenship in a difficult socio-economic historical period characterised by the emergence of new social risks, alongside a strain on old ones.

Italy is a conservative-corporatist regime according to Esping-Andersen's typology (1990). This means that it aims for income maintenance and is based on the preservation of status differentials through employment-based social insurance, that vertical redistribution is negligible, as exemplified, for instance, by the lack of a minimum income until very recently and that family is the main *locus* of welfare. To give a quantitative overview of how welfare expenditure is distributed, expenditure on old age and survivors represents almost 60% of the total, 'reflecting both a high share of elderly population and generous pension benefits with high replacement rates' (IMF 2017), followed by sickness, healthcare and disability (29.4%), unemployment (5.8%), family and children (5.4%), and lastly housing and social exclusion (0.8%). Pensions and healthcare thus account for slightly less than 90% of total social expenditure. As Ferrera and Jessoula (2015) note, Italy's system presents a functional distortion, in that it favours old age as a risk to the detriment of family, employment and poverty relief. It also maintains a distributive distortion

due to difference in treatment across sectors and categories and with regard to outsiders and insiders.

In the on-going debate about the number and composition of the worlds of welfare (Abrahamson 1999, Arts and Gelissen, 2002, Ferragina and Seeleib-Kaiser 2011), Italy's distinctiveness compared to the other two conservative-corporatist regimes, France and Germany and its common features with those of Southern Europe, or the Latin-rim, (Leibfried 1993; Ferrera 1996) have not gone unnoticed. Ferrera (1996) highlights three main traits: (a) high fragmentation of the income maintenance system along occupational lines, together with generous pensions and large gaps in protection; (b) the departure from corporatist traditions in healthcare; and (c) particularistic-clientelistic relations. Another aspect worth considering is the generally low level of in-kind services as opposed to monetary transfers. Family policies not only lag behind quantitatively and also rely on cash transfers but are largely contribution-based (Jessoula and Alti 2010). This has led to a 'familialism by default', a lack of public alternatives to family care (Saraceno 2010) or a low level of defamilisation (Esping-Andersen 1990). This situation is partially counterbalanced by the wide network of Catholic charities (Madama 2013), even though secularisation has reduced their role (Jessoula and Alti 2010).

However, the limits inherent to 'methodological nationalism' (Jeffery 2008) – the focus on the state level as analytical unit – become apparent when moving beyond the three dimensions of old age pensions, sickness benefits and unemployment insurance, as in Esping-Andersen's work, to include healthcare and social assistance. Healthcare and social assistance present striking within-state differences along the North-South divide, compounded by the process of regionalisation and fragmentation between regions and municipalities.

Historically, Italy's welfare developed during the Liberal and the Fascist regimes and further consolidated in the second post-war period and the *Trente Glorieuses.* After the Second World War, the welfare state grew substantially in terms of expenditure, generosity, and coverage. Its Bismarckian design of income maintenance was largely unaltered throughout and to a certain extent state legislation predates the Republican period. By contrast, the establishment of the National Health Service (Servizio Sanitario Nazionale or SSN) in 1978, largely financed through general taxation, replaced all pre-existing professional insurance schemes – this modified the occupational path in favour of a Beveridgean universal health care coverage, forming an important part of Italy's mixed paradigm. However, Toth (2016) argues that there is a stark difference between the universalism on paper and the one in reality, in consideration of the unmet 'medical needs', which makes it a 'universal yet ungenerous system'.

In the wake of inflation and stagflation, following the oil-shocks, the *status quo* was largely preserved, thus supporting the idea of a conservative-corporatist 'frozen landscape' (Esping-Andersen 1996). Such view was further reinforced by the adoption of labour-shedding strategies in the 1980s, motivated by the conservative-cor-

poratist underlying idea of the 'male breadwinner' model, which required full-employment – with the trade-off of high youth and female unemployment, especially in the South. However, the impact on welfare demand and supply of post-fordism, its demographic correlates, globalisation and Europeanisation, with the rise of new social risks (Taylor-Gooby 2004; Bonoli 2005) along with a strain on old ones, has eventually required changes on a variety of dimensions, including: cost containment measures, flexibilisation of the labour market and use of active labour market policies (ALMP) and an enhanced focus on poverty and social exclusion.
Nevertheless, there has been an over-reliance on retrenchment with limited recalibration (Graziano and Jessoula 2011; Ascoli and Pavolini 2015). The limited recalibration is problematic given the generally low effectiveness of Italy's social security system. An indicator of this is the decrease of the proportion of people at risk of poverty after social transfers: 5.3 points (from 24.7% to 19.4%) while the EU average is 8.9 points (ISTAT 2016) – a gap of 3.6 percentage points, with only Greece performing worse (3.9 points). This is unsurprising given the general low vertical redistribution entailed by the social security system. Moreover, it has been compounded by the lack of a minimum income until very recently – another defining trait of Italy's system. According to Ferrera (2005) various factors impacted on said absence, including: the role of the family, the irregular and underground economy and low administrative capacities. Despite all this, the acuteness of poverty following the economic and financial crisis, with 4.6 million people living in absolute poverty (ISTAT 2016[1]) up from almost 1.7 million in 2006, has paved the way for a national anti-poverty strategy with the 2016 Stability Law. The latter set up a Fund for Combating Poverty and Social Exclusion, extended the pilot SIA (Support for Active Inclusion) nation-wide, targeting low-income families with dependent children, which was then replaced by the REI (Inclusion Income) — first introduced within an enabling law in 2017. The REI is a monthly cheque assigned on the basis of economic criteria for a total of 18 months (renewable for 12 more months), which is worth between 190 and 540 euros. It represents a first move towards a national minimum income scheme informed by the principle of 'selective universalism' but, for now, for only limited beneficiaries notwithstanding the fact that the 2018 Budget Law has increased its generosity and coverage.

2 The state of devolution

2.1 Historical remarks

Italy was created as a unitary and highly centralised liberal state in 1861. It was a monarchy since its unification, during the Fascist regime (1922-43) and until the second post-war period, when it became a parliamentary republic following a

1. http://ec.europa.eu/social/BlobServlet?docId=16147&langId=en.

national referendum in 1946. The Constitution that came into force in 1948 defined the Italian Republic as a unitary state divided into regions, which exercised the competences laid down by art. 117. From its very origins, the Italian state suffered from a low sense of national identity and civic culture (Verba and Almond 1963), so much so that Massimo d'Azeglio, a pioneer of unification, said 'we have made Italy, now we must make Italians'. Indeed, 'strong regional and local identities are part of history's bequest on Italy' (Putnam 1993, 18) given the presence of both regional and city-level legacies. However, a highly politically and administratively centralised state first came into being, a process contested in the South, and labelled 'Piedmontisation'.

The regional state created in 1948 was an asymmetrical one – with the creation of 5 special regions and 14 ordinary ones. The former regions were set up quite rapidly, between 1948 and the mid-sixties, but regions under ordinary statute were only established in 1970, to become operational in 1977. Such a picture conceals, however, the reality on the ground – with regions facing restrictions: on the one hand, severe limitations in terms of financing dependent on state transfers; and on the other, decisional constraints both on the centre and the municipalities (Fargion 2005; Ferrera 2005; Baldi and Baldini 2014). Since the late 1990s, Italy has undergone a significant process of reform, which has strengthened the meso level of government. An essential driver was the need of cost-containment and later the Northern League's influence, which gathered resentment for the draining of resources and inefficiencies along the North-South divide. The so-called 'Bassanini' laws of 1997, in particular, Law 59/1997, gave regions strong administrative powers. The goal of the reform was to bring about with an ordinary law the largest degree of decentralisation possible within the Constitutional setting in place (known as 'Federalism with an unchanged Constitution'). In 1999 the direct election of regional governors was approved, following that, in 2001, a major constitutional reform (2001), took place, and in 2009, steps towards fiscal federalism were made.

The 2001 Constitutional reform devolved to the regions exclusive competences in all the fields not explicitly listed as state-exclusive or shared competences. They acquired primary responsibility in social assistance and healthcare, among other policy areas. Besides, the reform gave Constitutional status to the reorganisation of the multi-level administrative structure. Italy is now to be considered a regionalised unitary country with special status regions having wider powers (OECD 2017), despite the fact that the increased devolution has reduced the asymmetry of the institutional setting, as the reforms enacted have closed the gap in autonomy by strengthening ordinary regions (Amoretti 2016). Further, in October 2017, the Veneto and Lombardy regions called their electorates to vote on greater autonomy, pursuant to article 116 par. 3 of the Constitution, and won by a landslide – 95% of those who cast ballots in Lombardy (38% turnout) and 98 percent in Veneto (57% turnout) supported it. In fact, regions are permitted to negotiate with the State, after consultation with the local authorities, regardless of a specific popular man-

date. Yet, the results of the two referenda are likely to provide a strong political mandate. They also show, *contra* Del Pino and Pavolini (2015), the salience of devolutionary forces and the renewed strength of the (former Northern) League, ahead of the national elections.

2.2 Constitutional setting

In terms of Constitutional sources of law with regard to welfare rights, the latter are founded on the balancing of the traditional principles of liberty and equality as enunciated in the Fundamental Principles in articles 2 and 3 of the Constitution. Article 4, also in the Fundamental Principles, places emphasis on citizens' right to work. Relatedly, in Title III 'Economic rights and duties', according to article 35 'the Republic protects work in all its forms and practices. For what regards social security and social assistance, article 38 affirms that 'a) *Every citizen*[2] unable to work and without the necessary means of subsistence is entitled to welfare support. b) *Workers*[3] have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment'. Entitlements to social security are contributory, as social security refers to the worker rather than the citizen. By contrast, social assistance is based on the principle of solidarity and targets the citizen. This split between social security and social assistance has been acknowledged by the Constitutional Court's ruling 31/1986 (Cinelli 2015) and is now reflected in the distribution of competences pursuant to the new art. 117. Similarly, Title II of the Constitution, which refers to 'Ethical and Social Rights and Duties', frames health and healthcare in terms of equity in article 32 par. 1 – 'the Republic safeguards health as a fundamental right of the *individual*[4] and as a collective interest and guarantees free medical care to the indigent'.

2.3 The division of competences in social security

In analysing the distribution of normative, administrative, and financing competences between the federal state and the federated entities in a number of countries, Pieters[5] (EISS 2017) provides a succinct and visually powerful overview.

2. Own emphasis.
3. Own emphasis.
4. Own emphasis.
5. Type of competence: N for normative, A for administrative, F for financing. Level of Competence: if green, at federal/central level; if red at the level of the federated entity; if yellow, shared, with priority for federal level. A 'P' means the competence to set the basic norms. Policy areas: OA&S: old age and survivorship; UB: unemployment (benefits); WI: Work incapacity; LA&PD: Labour Accidents and Professional Diseases; HC&C: health Care and long term Care; FA: Family (allowances); SA: Social Assistance.

Table 1. Division of competences in social security and social assistance

	OA&S			UB			WI			LA&PD			HC&C			FA			SA		
	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F	N	A	F
Italy													P						P		

Pieters (EISS 2017)

What is immediately apparent is that to a large extent the mixed paradigm of worker and citizen protection is reflected in the areas of devolved competences. The traditional Bismarckian sectors display a clear dominance of the central level (green) in terms of normative (N), administrative (A), and financing (F) competences. Indeed, social security (*strictu sensu*) is part of the exclusive legislative power of the state, with the complementary and integrative forms shared between state and regions.

As regards healthcare, structured as it is in a Beveridgean style, and social assistance, which also refers to the citizen rather than the worker, it is possible to see that competences are devolved to the meso-level (red). The difference between the two is that, while in both cases the state still has retained the competence to set the basic norms, such state competence is exclusive for healthcare (P, with green background) while it is shared for social assistance (P, with yellow background). Such a descriptive framework is consistent with Ferrera's view (2005) that, notwithstanding the Northern League's demands, pensions and sickness, work injuries, and unemployment insurance (national compulsory transfer schemes) have not been affected by regionalisation and the impact was confined yet strong on all other welfare sectors, particularly healthcare, social assistance, labour market policies and supplementary pensions. More broadly, the split is consistent with international experiences (Obinger, Leibfried and Castles 2005; Keating 2009) with the meso-level gaining control of 'distributive' services rather than 'redistributive' functions (Lodge and Trench 2014).

Taking a closer look, according to article 114 of the Constitution 'The Republic is *composed* of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State. Municipalities, provinces, metropolitan cities and regions are autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution'. As a result, Italy has three levels of local government, including municipalities (8.047), provinces and metropolitan cities (107), regions (15 ordinary and 5 with special status) and two autonomous provinces. Article 114 results from the amendments introduced by Article 1, Constitutional Law n. 3, 18 October 2001 – the original text stated: 'The Republic is *divided* into Regions, Provinces and Metropolitan Cities'. The amended article recognises an 'equal institutional pluralism' and the fall of state supremacy.

State and regions can only act within the limits of the competences the Constitution confers on them, according to the principle of conferral of competences; of which there are three types: exclusive for the state, shared and exclusive for the regions. Firstly, the state has exclusive legislative powers regarding the subject matters specified in article 117 par. 2,[6] including letter. m) the determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory, letter n) general provisions on education, and letter o) social security. Secondly, subject matters of shared competence are specified in art. 117 par. 3[7] and include health protection; complementary and supplementary social security. In the subject matters covered by shared legislation, legislative powers are vested in the regions, except for the determination of the fundamental principles, which are laid down in state legislation. Thus, regions and states are complementary actors, a model that 'differs from the German pattern of *konkurrierende Gesetzgebung*' (Martinico 2011, 4) Thirdly, art. 117 par. 4 specifies that regions have legislative powers in all subject matters that are not expressly covered by state legislation – thus, including social assistance. This shift to regions as 'residual

6. a) foreign policy and international relations of the State; relations between the State and the European Union; right of asylum and legal status of non-EU citizens;
b) immigration;
c) relations between the Republic and religious denominations;
d) defence and armed forces; State security; armaments, ammunition and explosives;
e) the currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalisation of financial resources;
f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament;
g) legal and administrative organisation of the State and of national public agencies;
h) public order and security, with the exception of local administrative police;
i) citizenship, civil status and register offices;
l) jurisdiction and procedural law; civil and criminal law; administrative judicial system;
m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory;
n) general provisions on education;
o) social security;
p) electoral legislation, governing bodies and fundamental functions of the Municipalities, Provinces and Metropolitan Cities;
q) customs, protection of national borders and international prophylaxis;
r) weights and measures; standard time; statistical and computerised coordination of data of state, regional and local administrations; works of the intellect;
s) protection of the environment, the ecosystem and cultural heritage

7. 'international and EU relations of the Regions; foreign trade; job protection and safety; education, subject to the autonomy of educational institutions and with the exception of vocational education and training; professions; scientific and technological research and innovation support for productive sectors; health protection; nutrition; sports; disaster relief; land-use planning; civil ports and airports; large transport and navigation networks; communications; national production, transport and distribution of energy; complementary and supplementary social security; harmonisation of public accounts and co-ordination of public finance and taxation system; enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities; savings banks, rural banks, regional credit institutions; regional land and agricultural credit institutions".

legislators' is an important one, and article 117 reverts to the original pattern that used to be in favour of the State. Regions, however, are subjected to the '*basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory*' (art. 117 par. 2 letter m), with which they have to comply due to the principle of jointly liable federalism (Vandelli 2004) – such 'transversal matters' could 'evidently serve as a Trojan horse for the centralisation of competences' and mitigate the effects of an otherwise potential 'Copernican revolution' (Martinico 2011, 6).

3 The state of (administrative) decentralisation

Italy's 'equal institutional pluralism' puts each government level on a par in terms of 'status'. However, based on the principle of subsidiarity, the smallest level of government has a 'preferred position': the regional level for legislative power and the municipalities for administrative power (Pajno 2009). Regarding administrative functions, the latter are *prima facie* attributed to the municipalities, according to art. 118. Indeed, Italy has a long municipal tradition. Not only do the '*comuni*' date as far back as to the Middle Ages, but regional states developed in Northern Italy directly from the communal experience (Ascheri 2006; Litchfield 2014). Administrative decentralisation, together with autonomy and the indivisibility of the Republic, is enunciated in article 5 of the Constitution:

> '*The Republic is one and indivisible. It recognises and promotes local autonomies and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation*'.

Yet, subsidiarity is mitigated by the principles of adequacy, differentiation and proportionality. Administrative functions are 'attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation' (Art. 118 Constitution). As a result, the need for an adequate organisation of the institutions managing the task is taken into account. Article 120 par. 3 and 4,[8] defines the limits of the substitutive power of the government

8. 'The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities.
The law shall lay down the procedures to ensure that subsidiary powers are exercised in compliance with the principles of subsidiarity and loyal co-operation'.

Together with vertical subsidiarity, art. 118 relates to horizontal subsidiarity, in its par. 4: 'The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity'.

3.1 Focus on healthcare and social assistance

Let us now look at healthcare and social assistance. It is the national level – the Ministry of Health – that determines the goals and principles of the health system, the core services to be provided ('essential levels of assistance' or LEAs), and the allocation of national funds to the meso-level. Regions and autonomous provinces organise healthcare: they define targets, priorities and the allocation of resources across spheres of healthcare provision. Local Health Firms (ASL) deliver healthcare, guaranteeing the actual provision of said LEAs, either directly or indirectly.
The first transfer of responsibilities to the regions dates back to Law 833/1978, which established the National Health Service (Servizio Sanitario Nazionale). This transfer was, however, a spurious one because of weak administrative structures, the reliance on state funding (Mosca 2006), and the main levels of governance being in fact the State and the municipalities rather than the regions (Turati 2012). The law resulted in a strong political patronage system within the (at the time) 'Local Health Units' (USL) that created inefficiencies (*malasanità*) and growth in expenditure – particularly in the M*ezzogiorno*. Faced with such challenges, the 1992-1993 reform by Amato and Ciampi's technical governments moved towards greater regionalisation, managerialism and quasi-markets – despite the aspects imbued with New Public Management principles being partially reversed by Legislative Decree 229/1999. Local Health Units were transformed into independent public bodies known as Local Health Firms (ASL) and major hospitals became semi-independent public enterprises (Aziende Ospedaliere, AOs) – both ASL and AOs were made accountable to the regional governments (Cabiedes and Guillén 2001; Maino 2001; Ferrera 2005; Ferre' et al. 2014)). In a nutshell, regions had become the primary level of government with regards to healthcare even before the 2001 Constitutional reform (Tediosi, Gabriele and Longo 2009).
As for social assistance, the 2001 Constitutional reform devolved this to regions as their exclusive competence. Already in 1977 social assistance policies were largely decentralised to the regional level, but it was only in the 80s and 90s that regions started to adopt framework laws for the municipalities within their territorial boundaries. With Law 328/2000, the first legislative act after the Crispi Law of 1890 to comprehensively re-organise social assistance, a national framework law was approved, with the goal of better managing services and providing national standards – the 'essential levels' of assistance and services (LIVEAS). Law 328/2000 defined an entangled multi-level system between levels of government

and the third sector, with five main principles: uniformity of standards, decentralisation and cooperation with the third sector, universalism, rebalancing towards provision in-kind, funding through a yearly National Social Fund (Saraceno 2006; Fossati 2009). The impulse to reform came from the increasing importance of new social risks, the fundamental inequity of Italy's welfare, and the ensuing need for recalibration, as suggested by the Onofri Commission in 1997. Meanwhile, Italy had also introduced the ISE (Economic Situation Indicator) to standardise eligibility to means-tested social benefits and piloted a minimum income scheme (Reddito Minimo d'Inserimento) in a few municipalities, of which law 328/2000 suggested that it be extended nationally.

Law 328/2000 focused on an institutional distribution of competences with regard to integrated planning: vertically, it recognised a National Social Plan and Regional Plan (art. 18) and an Area Plan (art. 19); horizontally, it devoted much attention to the third sector (art. 1 par. 4). As Minas and Øverbye (2010, 211) put it 'regions and municipalities are partners in a complex multilevel governance system with vertical (and horizontal) subsidiarity, working with area plans as their basic regulative tool.' With the 2001 Constitutional reform the State could not set standards or targets any longer, unless they were part of the basic levels. However, 'national minima for social policies have not been identified yet, although they were foreseen since the introduction of the framework law on social assistance in 2000' (Barberis, Sabatinelli and Bieri 2010, 187). Regions became competent for agenda and priority setting and planning. Some regions have passed their laws, while other have not. Regions bear the main financial responsibility, while financial coordination is borne by regions and municipalities.

Regions' legislative power in social assistance also includes determining whether decision-making power should be further decentralised to local governments – with some regions delegating more to the local authorities and others opting for stronger centralisation. For instance, Minas and Øverbye (2010), note how administrative decision-making in the social assistance of Emilia-Romagna resembles a 'deliberative version of a democratic accountability', with regions encouraging the involvement of local authorities. By contrast, Lombardy exercises a strong top-down control. Similarly, for healthcare, different regions have made different choices on how to use their increasing autonomy – both in terms of governance and delivery. Exemplary, Tuscany decided to keep its system heavily centralised, while Lombardy relied on indirect delivery including an emphasis on private providers, with citizens given the opportunity to choose (Ferré et al. 2011).

4 The state of the debate and future perspectives – innovation, learning, and equity

The most common argument in support of devolutionist theories is based on the fact that it contributes to a more accountable governance system and it leads to

augmented economic and allocative efficiency, by overcoming information asymmetries and being better placed to tailor policies and service provision according to local preferences (Calamai 2009). Together with *preferences*, one could add local *needs*. Ferrera (2005), highlights how the ability to cope with the new social risk of 'dependency' is linked to the local availability of appropriate care, nor is the situation much different in the areas of labour activation or child care. Proponents also tend to regard it as democratic, participatory, and innovative – with not only decision-making more sensitive to local need, but also many opportunity points for potential policy transfers and innovation, adaptable to local circumstances. Besides, innovations can also result from the regions taking pride in being innovation makers because of a cultural struggle with the centre or to gain legitimacy.

Among such favourable dimensions, innovation and mutual learning deserve a special emphasis. While the Italian Regional Health Services all share a common Beveridgean nature, their component parts have taken rather dissimilar forms. Nuti et al. (2016) take advantage of the natural experiment thus provided to show that the adoption of a mixed model of governance that combines 'hierarchy and targets', 'transparent public ranking' and 'pay for performance' ensured, between 2007 and 2012, improvement of high performing regions. By contrast, other high-performance regions that adopted two of the abovementioned three models and which in particular did not provide for external benchmarking, recorded a decrease or maintained their position. What is interesting and fruitful is that the potential for mutual learning is not confined to meso-level experiences within national boundaries, but also occurs outside them: in a series of papers (Bevan 2016, 2010; Bevan and Evans 2018; Bevan et al. 2014; Bevan and Hamblin 2009; Bevan and Hood 2006) pertaining to the UK context, the importance of benchmarking performance in improving healthcare, in view of its reputational effects, has been repeatedly highlighted. A similar reasoning also applies to the choice and competition model, which was only endorsed in Lombardy in Italy and in England but not in Scotland or Wales (Fierlbeck and Palley 2015) – Nuti et al. (2016) remark that the latter is not associated with better performance in itself, a situation similar to the English internal market given that 'reforms have not been proven to bring about all benefits classical economic theory attributes to markets' (Brereton and Vasoodaven 2010), such as provider responsiveness, efficiency, and innovation, while incurring its transaction costs, 'notably management and administration costs' (HCHC 2010, 3). As for social assistance, Naldini and Saraceno (2008, 744) remind us, for instance, that 'law 1/2000 of Emilia Romagna on children's right to education may be mentioned as a good example of policy and governance changes driven by a regional body. Other regions explicitly consider it a model to follow. In this law, the emphasis is on children's right to be educated from age 0 to 6'.

Conversely, criticism is usually founded on grounds of equity, since regional disparities in income, tax bases, and service supply may be reinforced while the share of central revenues needed for effective redistributive policies may decrease.

According to Rodríguez-Pose and Gill (2004), the tendency towards devolution reflects renunciation of the traditional equalisation role of the central government in favour of economic and public competition, which favours rich regions to the detriment of poorer areas. Together with the economic variables, the cultural and political context, as well as the administrative skills of the actors involved need to be considered (De Vries 2000; Mapelli et al. 2007). In the case of healthcare, Toth (2014) notes how regionalisation has been widening the North-South gap in terms of quality (patient satisfaction and patient mobility across regions) and expenditure. Toth (2015) also highlights how differential quality further impacts on deficits: this is because regional healthcare systems must reimburse the cost of outward mobility – with Centre-South regions transferring about EUR 1 billion a year to the northern ones where better service, shorter waiting times, and more specialised care is available.

In social assistance, the fragmentation along territorial lines is also well documented. Using ISTAT data for the period 2005-2010, Bertin and Corradore (2016), conducted a hierarchical cluster analysis of Italy's regions and individuated six different welfare models. The research reinforces the view of a two—paced Italy with great differences within the North and the South as well. It also emphasises the lower availability of in-kind services to address social needs in southern regions and their relative disadvantage with regard to the so-called 'social investment' approach (Morel, Palier and Palme 2012). In a nutshell, the absence of the central level of government in planning, coordinating, monitoring and evaluating social assistance is resulting in the evanescence of the concept of national social rights. The different regional patterns are associated with economic development – thus, Italy's welfare seems unable to de-commodify and rebalance socio-economic disparities (Bifulco 2005; Caltabiano 2004; Kazepov and Genova 2005; Madama 2013; Pavolini 2016). What is more, Del Pino and Pavolini (2015), comparing Spain and Italy, show how: firstly, the correlation between regional economic development and welfare state performance vis-à-vis health, child and elder care is stronger for Italy; secondly, that the split between Centre-North and South is clear-cut in Italy, whereas it has less of a scope in Spain; thirdly, that territorial variation is both more frequent and intense in Italy than in Spain; fourthly, that such variation has increased in Italy since the crisis while it has remained stable or has even decreased in Spain. Conversely, in Italy less variation is to be found in education, a policy area that is still largely dependent on the central level.

In conclusion, regions have diverged rather than converged and disparities in terms of levels of taxation, user charges, provision, quality and accessibility of healthcare and social care for the elderly, children and the disabled, among others have fragmented social citizenship. What is more, the austerity measures due to international pressures and Italy's huge debt, have brought about a retrenchment rather than recalibration of the welfare state. In the South, this has made it difficult to provide core entitlements, while in the North it has hampered the impulse to

innovate. Andreotti and Mingione (2016, 260) have individuated certain conditions that help to reduce inequalities, including: '(1) a national and supra-national institutional regulatory framework which aims to ensure basic levels of protection to the population; (2) an effective system for redistribution from central authorities towards local bodies and social groups in greatest need'. Firstly, and promisingly, in January 2017 the essential levels of assistance (LEAs) for healthcare were finally updated after 16 years of waiting. According to Bergo (2017), while they cannot resolve the large disparities between North and South, they could help regions that lag behind to catch up on specific services, following the example of better organised regions. However, both Bergo (2017) and Delledonne (2010) note how the balancing of substantial equality, autonomy, and budgetary constraints in defining the 'essential levels' has changed in the last two-three decades or so – from their initial appearance in law 833/1978 that originally aimed at a homogeneous and unitary system with an emphasis on substantial equality, through to nowadays with the growing centrality of meeting fiscal constraints and thus limiting 'essential levels' to core entitlements, which regions can sustain financially without central fiscal equalisation measures, whereas the prevalent interpretation defines them as more than standards ensuring minimum levels. Bergo (2017) reminds us that since 2012 the level of central financing has shrunk by EUR 30 billion, a fact that endangers the current standards, let alone advancing them. Nor is the situation any better in social assistance, with the lack of the so-called LIVEAS. Secondly, Italy lacks an effective redistributive central system, for its Bismarkian and southern-European defining features. Higher coverage and generosity of central schemes protecting the citizen, rather than those protecting workers are needed – the recently introduced minimum income scheme is a step in the right direction, albeit a timid one. Lastly, governance features that can be learnt thanks to innovation across regions could prove useful in mitigating Italy's geographical divide as shown by Nuti et al. (2016), yet the learning process may be hampered by welfare rationing and the lack of nationally comparable data.

Devolution and decentralisation in social security: the situation in the Netherlands

Annette Jansen and Gijsbert Vonk

1 A general picture of the system of social security and the administrative structure

The Dutch social security system is highly eclectic: it bears the marks of different schools of thought, preferences and approaches in the rich history of European social security.

Pre-war social security was in keeping with the continental, corporate approach, which was reflected in the first social insurance schemes that were based on the involvement of employer and employee organisations at sectoral level. After World War Two social insurance was influenced more by the Beveridge approach to social security. This is visible in the emergence of *national insurance.* This is a system of national insurance schemes that are (formerly) based on the insurance principle and provide minimum income protection. National insurance schemes in the Netherlands have been introduced for the risks of old age (AOW 1957), death (AWW 1959, currently Anw), children (AKW 1972), incapacity for work (AAW 1975) and special medical expenses (ABWZ 1976, currently Wlz).

No national insurance schemes have been created to cover unemployment and illness; instead there are employee insurance schemes (WW and ZW). The risk of incapacity for work currently also falls within the exclusive scope of an employee insurance scheme (the WIA Act, the Dutch Work and Income (Employment Capacity) Act. The AAW was abolished in 1998.

A system of social assistance and social care creates a general safety net under the system.

After the system was completed in the 1970s a reform process was started that is still ongoing today. This was in response to economic stagnation and an increased number of beneficiaries. Activation and cost cutting have been constant motives for the reforms, as well as the equal treatment of women and individualisation. For many years the Dutch system was based on the breadwinner principle. Right up until the passing of Directive 79/7/EC on Equal Treatment many schemes still

excluded married women from being eligible for benefits unless they were breadwinners.

In the nineteen nineties the Dutch had a serious flirtation with the privatisation of their social security system. Traces of this can still be seen in the private administration of the insurance scheme for curative care (Zvw) and the employer's obligation to continue to pay wages during the first two years of incapacity for work. This obligation to continue to pay wages replaces the employees' entitlements under the ZW (the Dutch Sickness Benefits Act), which now simply acts as a safety net. In this two-year period, in addition to the requirement to continue to pay wages the employer is also required to make arrangements for the reintegration of employees who are ill. Private insurance companies and reintegration agencies can assist employers in carrying out this task.

The 21st century also marks the start of social allowances being paid through the taxation system. These allowances are paid by the Dutch Tax and Customs Administration and are gradually reduced as employees earn more. Allowances are paid as compensation for rent, healthcare contributions, childcare and children. These allowances fall under the regime of uniform concepts in the AWIR (Dutch General Act on Income-related Schemes).

In recent years, further efforts have been made to create a uniform system of support for people who are disadvantaged on the labour market, often due to a combination of physical, mental or social impairments and who as a result have to depend on assistance and support. To give municipalities more opportunity to provide these people with integrated customised support the available reintegration resources, social support and youth care have been merged. The objective of this is to create a system at local level that is less dependent on central rules and more responsive to the needs of the individual citizens. This policy shift is referred to as 'the decentralisation in the social domain', although it should be borne in mind the municipalities continue to carry out their tasks within the framework of national statutes, which come under the responsibility of the central government.

The main administrative organisations for the social insurance schemes are the UWV (Employee Insurance Agency) and the SVB (Social Insurance Bank). These are public bodies. Because they are somewhat distanced from the responsible minister, they are also referred as independent administrative bodies. The UWV and SVB have a technocratic management appointed by the Minister for Social Affairs and Employment. They are central organisations with regional offices. The ZVW (Dutch Healthcare Insurance Act) schemes are implemented by private healthcare insurance companies, with a coordinating task, for a public body: the Dutch Healthcare Authority. The Tax and Customs Authority plays its part in the social security system by collecting taxes and paying income-related allowances. And finally, municipalities have an increasing task in the area of social assistance, reintegration and care.

2 The state of devolution

2.1 Historical remarks

The Kingdom of the Netherlands was created in the 16th century during the joint action of the different regions against the Spanish ruler. 1581 was a decisive year in which the authority of the ruler established by Spain was overthrown with the 'Plakkaat van Verlatinge' (the Act of Abjuration). In 1648 the seven republics united to form the Republic of the United Netherlands. This was a highly decentralised union in which the republic only had decision-making powers in relation to external affairs like foreign relations, the army and the supervision of trading companies. The regions retained their sovereignty. This period also saw the establishment of the Staten-Generaal, the representative consultative body in which every region (except Drenthe) had a vote. Holland, however, being the richest region that paid more than half the costs, had a dominant vote. From 1593 the Staten-Generaal met at the Binnenhof in The Hague on almost a daily basis. The Raad van State (Council of State) also dates from this period and has developed to become an advisory body for the Staten-Generaal. At the same time the Rekenkamer (Court of Auditors) was established to supervise finances, which had a favourable effect on integrity and the financial structure of the Republic. At the head of the Republic there was a stadhouder (governor), the title of which was given to a consecutive line of descendants of Oranje Nassau: from William the Silent (Willem de Zwijger) to Willem V.

Under French rule the structure of the Republic of the United Netherlands changed during the Batavian Republic (1795-1806). The Netherlands became a national unitary state for the first time although it was soon subjected to French rule. The first constitution was established in 1798: the State Regulations for the Batavian People.

After French rule in 1814 the Netherlands (and Belgium) became a monarchy with Willem I as its sovereign prince. The new Constitution entered into force in 1815 and the foundation of today's two-house system was established. The unity with Belgium was short-lived and in 1830 Southern Netherlands separated itself from the North and Belgium became an independent state.

Since that time the Netherlands has had its current size and constitutional structure: a parliamentary democratic constitutional state.

2.2 Constitutional setting

The Netherlands is a unitary state with a decentralised structure, which means that government is shared between different layers. The most important ones are the provinces, municipalities and the water authorities. The latter are responsible for water management, which obviously plays an important role in a country like the Netherlands. Also other public bodies may be established. Thus for example, 'pub-

lic bodies for professions and trades' only have government authority in a specific area; this is also referred to as a 'closed housekeeping'. An example of a public body for trades is the SER (Social and Economic Council), a tripartite institution for government, employers and employees, with an advisory task in the area of national social policy. Other public bodies may established to arrange their own domestic affairs in a geographically defined area. Use of this option was made in 2010 for the overseas islands of Bonaire, St. Eustatius and Saba.

2.3 The division of competences between the layers of government

2.3.1 State structure (i.e. federal, confederal, unitary)

Since 2010 the Kingdom of the Netherlands comprises four countries: The Netherlands, Aruba, Curaçao and Sint Maarten.[1] The other islands of the former Dutch Antilles (the 'BES islands') became public bodies with this change in state structure, roughly similar to municipalities. These Caribbean islands have been inherited from the Netherlands' colonial past. The other colonies became independent states long ago.[2]

As said, the Netherlands is a unitary state with a strong central government, divided into provinces, municipalities, water authorities and other public bodies. This division into different levels of governance is referred to as 'Thorbecke's house' after its designer. The State, the provinces and the municipalities are each responsible for their own housekeeping at their own level with the accompanying competences (Elzinga and De Lange 2006, 833). This means that government authorities at lower levels can take on tasks that they consider necessary in the interests of the municipality or the province (Zijlstra 2009, 237). Higher levels of governance can take over or take back tasks from lower levels. Ultimately it is the legislator who decides, with an eye to the general public interest, whether a specific task will be performed at a lower or higher level of governance.

Powers can be exercised 'autonomously' or 'in joint governance' (Article 124 of the Constitution). Autonomy can be exercised in areas pertaining to the 'housekeeping' of the municipality. This relates to 'tasks that are considered necessary in the interests of the municipality or the province'. This phrase is not specifically defined anywhere and consequently the concept can change in line with the spirit of the times.

Joint governance means that the lower levels of governance implement the policy made centrally. The State reimburses the cost of exercising competences in joint governance (Article 108 of the Municipalities Act and 105 of the Provinces Act). These competences include a clear description of the tasks and objective.

1. Art. 1 Statuut voor het Koninkrijk der Nederlanden.
2. *Holland vs the Netherlands* [video], dir. CGP Grey, YouTube, 2012.

Municipalities enjoy only limited financial autonomy; one sixth of their total budget comprises municipal taxes.[3] The rest comes from general taxation from the Central Government and the municipal fund.[4] Central financing takes place on the basis of block grants. If municipalities overspend they have to bear the costs themselves, but if they end up with a surplus they are free to spend this however they want. In this way municipalities are encouraged to allocate the funds they are given as economically as possible (Van der Werf 2012, 44).

2.3.2 Division of competences in social security

How, broadly speaking, is this state structure reflected in the division of competences in Dutch social security? The answer to this question is that social security is largely a matter for central government.

Where national insurance is concerned, this role of the central government was initially shared with employer and employee organisations. But the tripartite institutions of those days, such as labour councils, business associations and health insurance funds no longer exist or have been converted into independent administrative bodies.

However, two observations should be made here to add nuance to this picture of central government intervention. The first relates to the reintegration task with regard to jobseekers with a disadvantage on the labour market. Formerly this is a task of the municipality, but the municipality works in partnership with employers and employees in newly established 'Werkbedrijven' (employment agencies). These Werkbedrijven are financed by the business community and in line with the saying 'he who pays the piper calls the tune', this means that the organised business community is still able to influence the administration of social security.

With regard to the system of insurance for curative care and to some extent for income protection during illness, it could be said that the government has shifted tasks to private insurance organisations and employers respectively. However, the legal straitjacket within which this is done is so tight that there is in fact a hybrid form of regulated social security rather than a real transfer of responsibility.[5]

As regards social support, like social assistance, social care and youth care, the tasks are carried out by the municipalities in joint governance. Statutory regulations set out what task fields and degrees of freedom the municipalities have in this. It is a system of 'regulated decentralisation', in which in recent years the legislator has loosened the thumbscrews put in place by the central government. But the main acts, like the Participation Act (social assistance and reintegration of dis-

3. Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 'Inkomsten van gemeenten', *Inkomsten van gemeenten* [website], <http://kennisopenbaarbestuur.nl/thema/inkomsten-van-gemeenten>, accessed 26 Feb. 2017.
4. Rijksoverheid, 'Gemeentefonds', *Financiën gemeenten en provincies* [website], <www.rijksoverheid.nl/onderwerpen/financien-gemeenten-en-provincies/inhoud/gemeentefonds>, accessed 26 Feb. 2017.
5. Cf. Vonk 2010.

advantaged persons), the Wmo 2015 (Social Support Act) and the Youth Act remain national laws. The financing of the social facilities is based on state subsidies to the municipalities, in which, at the very most, the change is that these subsidies are deposited into the general municipal budget, allowing municipalities more choice in how they spend the funds.
While until the start of the new millennium, within the framework of their autonomous competency, municipalities used to pursue their own income policy, sometimes assisted by central funds, now this is expressly no longer the intention. The poverty trap, the phenomenon that people become worse off when they start to work, is fuelled by the accumulation of income protection provided by the municipality (exemption from municipal taxes, special subsidy schemes etc.). The centrally regulated system of income-related allowances under the umbrella of the AWIR (General Law on Income-Dependent Schemes) is intended to combat the poverty trap. This system operates with allowances for poorer households that are gradually decreased as more is earned. This approach may not be undermined by municipal grants and local tax exemptions. Inasmuch as a poverty policy is still pursued at local level, this mainly regards providing benefits in kind (free entry to swimming pools, music lessons, etc).

2.3.3 Local responsibility or solidarity between local states/regions

From the above it emerges that under the roof of Thorbecke's house there is relatively little discussion about major issues relating to ownership and solidarity. Despite numerous recommendations and calls for more fiscal autonomy at local level[6] the financing of the municipal social security is still in the hands of the central government.
Nonetheless, solidarity discussions do play a role in the relationship between the Netherlands in Europe and the overseas territories. Within the kingdom, Aruba, Curaçao and Sint Maarten are now fully independent. There are no social security ties with these islands, not even with regard to finance, although it is not unusual for the debts of these islands to be waived by the Netherlands in Europe. In contrast, the ties of the BES islands (Bonaire, St Eustatius and Saba) with the Netherlands in Europe are much tighter. These small islands have acquired the status of public bodies, similar to Dutch municipalities. The responsibilities of the European government include assistance, poverty prevention and childcare. This is financed by free payments (in total approximately € 30 million,, of which 1.5 is designated for social tasks). Agreements about policy priorities are made between the island and central government.

6. For a list of such recommendations, cf. Raad voor het Openbaar Bestuur (ROB), 'Adviesrapport Uitbreiding lokaal belastinggebied', *Advice Report*, 2015, <www.rob-rfv.nl/documenten/uitbreiding_lokaal_belastinggebied.pdf>, accessed 2 Mar. 2017, 1 (footnote 2).

3 The state of decentralisation

3.1 Historical overview

The 1854 Poor Act can be seen as the start of statutory social security in the Netherlands. This act imposed a limited responsibility on the government. A poor relief committee was established in nearly every city that was highly interconnected with the municipality. Only when citizens had nowhere else to turn to, could they appeal to this poor relief committee for a contribution to their means of subsistence. This act excluded double grants so when the church made a contribution there was no assistance from the government, not even if the church aid was insufficient. Assistance was not a right but a favour and the provider had complete freedom as to amount or duration: optimum discretion (Van der Werf 2012, 35-48).

Assistance changed from being a favour to a right with the introduction of the ABW (General Assistance Act) that replaced the Poor Act in 1965. The underpinning logic for this act was that in modern society there are subsistence risks that are not inherent to an individual but that arise from social relationships and circumstances. It was society's responsibility to provide protection against these risks. With the introduction of the ABW the government assumed the legal responsibility to provide financial assistance to all Dutch citizens who find themselves in such circumstances, or who are on the edge of such circumstances, that they do not have the means to provide for the cost of living. In other words the ABW guaranteed a minimum level of subsistence.[7]

Because the ABW was introduced as framework legislation encouraging local diversity, it was possible for comparable cases to be dealt with in very different ways. Sometimes benefits were granted that exceeded the minimum wage. This was considered to be contrary to government policy. In 1972 the act was extensively revised. With this revision, among other things, national control was introduced. It became possible for central government to declare incurred costs to be unacceptable and supervisory rules were introduced.

In 1992 there was a new change of course as a result of which once again the emphasis was on decentralised implementation. Since the 1970s, due to the increase in the number of schemes based on the assistance act, an intricate system of legislation had been created. This threatened the individual approach and thus the underpinning aim of assistance: to prevent social disadvantage. General assistance continued to be regulated centrally but payments for special needs became subject to local discretion.[8]

A further push towards decentralisation was given in 2003 with the introduction of the Wet werk en bijstand (the Act on work and assistance). Municipalities were

7. *Kamerstukken II* 1991/92, 22 545, nr. 3, p. 7.
8. *Kamerstukken II* 1991/92, 22 545, nr. 3, p. 3.

compelled to enact local legislation covering issues such as activation policies and sanctions and the payment of additional local allowances. A new financial system was supposed to encourage the local authorities to help social assistance recipients find work. This was done by splitting the block grant into an activation part and a benefit part. Any surplus in the benefit budget was to be treated as a 'profit' at the free disposal of the local authorities. Initially large profits were reported by some of the bigger cities which actually managed to get people off the assistance register, be it permanent or temporarily.

On 1 January 2015 the municipalities were given more tasks and competences in the social field. These are tasks in the area of social support, youth care and the reintegration of disadvantaged persons. The revision was hailed by the government as the biggest implementation operation since World War Two. The 'decentralisations in the social domain' as these are called, not only include more tasks in more areas but the degree of freedom to act has also increased. There is more local policy freedom for municipalities to make their own policy or to issue generally binding regulations. Also the discretionary power in individual cases has increased.

The latest decentralisations have been dominated by the transition from the traditional welfare state to a 'participation society'. This transition was mentioned in the first King's speech before Parliament held by King Willem Alexander in 2013. Generally speaking the term is understood to refer to a society that relies more heavily on the individual's capacities and on the strength of the fibre of civil society (Vonk 2012, 2). To achieve this, support should be geared more to the individual's 'own strength' and real needs. This requires 'customisation'. The support should be designed in consultation with the citizen. This consultation is referred to as 'the kitchen table talks'. An 'integrated approach' is a priority here: one housekeeping, one plan and one provider is the motto. Such an approach should also make major economies possible. And indeed decentralisation has been accompanied by large budget cuts in the social domain. These are partly linked to the up scaling of the decentral authorities, with the objective of cutting administrative costs by 20%.[9] This is an unusual combination given that the advantages of decentralisation are realised exactly due to the fact that a municipality is closer to the citizen and is consequently in a better position to provide customisation. Newly established multidisciplinary neighbourhood teams have to bridge this tension. On 1 January 2015 the WWB (the Work and Social Assistance Act) was replaced by the Participation Act.

9. Kamerstuk, *Rapport brede heroverwegingen, 18. Openbaar bestuur*, Tweede Kamer der Staten-Generaal, Den Haag, 1 April 2010, <https://zoek.officielebekendmakingen.nl>.

3.2 Constitutional setting

Fundamental social rights have been embodied in the Constitution since 1983. Several of these fundamental rights regard social security, including Article 20 of the Constitution, which proclaims 'the means of subsistence of the population is a concern of the authorities'. The latter article expresses that government bears ultimate responsibility for setting up a system of social security. In the case of decentralisation this means that central government cannot rely on its entirety on lower levels of government. It should maintain a system of legislative regulations, control and supervision. This is sometimes referred to in terms of 'system responsibility'.[10]

3.3 Functional decentralisation versus territorial decentralisation

In decentralisation territorial criteria play a role, in functional decentralisation the emphasis is on furthering a (specific kind of) function or goal. But this distinction is not always clear cut. Thus the centrally organised functional bodies such as UWV and the SVB both make use of a multitude of regional offices. Conversely, municipalities, representing the territorial model, develop all kind of functional partnerships to perform their statutory tasks in the social domain. The functional and the territorial also mix in the newly erected Werkbedrijven where municipalities, employers and employees join together to help people with a disadvantage on the labour market find work. These Werkbedrijven are organised on a regional level.

3.4 The powers of the local decentralised level

All acts on social security are national statutes. This means that any the provincial and local level only have legislative competences or policy freedoms as far as these are explicitly recognized by these statutes.

3.4.1 Subordinate legislation and policy freedoms

The UWV and particularly the SVB only have limited discretion. The policy rules of these bodies are mostly confined to interpretations of the law. This is different for the municipalities that are actively called upon to create their own policy, usually in the form of local legislation. For example, the municipality is required to introduce byelaws on integration and activation, (the fine-tuning of) sanctions and individual income supplements (see Article 8 and 8a Pw (Participation Act)). The Wmo (Social Support Act) has the form of a mandatory policy plan, to be drawn up by the municipal council, in agreement with citizens and organisations. The rules governing the implementation of the policy plan should be set out in a bye-

10. Cf. Van der Steen 2016 for a definition of 'system responsibility'.

law.[11] A byelaw is also required to regulate the granting of individual support and the fixing of the personal contributions.[12]

When we talk about decentralisation in the social domain, we are referring to these kinds of national legislative framework provisions which provide competences for the municipalities to set additional standards themselves and to apply these in individual situations. This is a sophisticated form of 'regulated decentralisation' that links the policy mandates to different degrees of discretion for each policy issue.

3.4.2 Determining claims and providing services

Determining claims and providing services form the core of the administrative tasks of the UWV, SVB and the municipalities. In addition, the UWV and the municipalities have a reintegration task. The decentralisations in the social domain that materialised on 1 January 2015, do not only generate more freedom for each municipality to decide how they will perform their statutory tasks, but municipalities also have more freedom to take their own decisions in individual cases. To this end the legislator avails himself of the traditional instrument of increasing discretionary power, which makes customisation possible. Customisation is the dominant mantra of the decentralisations. An example is the 'customised support' in the Wmo 2015 (Social Support Act). The act gives the Municipal Executive complete discretion to determine what support is needed to ensure independence and participation.

The Pw (Participation Act) has also increased local and individual discretion but this is less visible when negative interference is involved, i.e. in the formulation of recipients obligations and the imposition of sanctions; here the central legislative directives have become stricter.

3.4.3 Local authorities and third party service providers

The deployment of private institutions to achieve public social goals is characteristic of the Dutch care and reintegration market. Here we are referring to quasi markets (Le Grand 1991; Bredgaard and Larsen 2006) through which the services of private companies are purchased by the government (contracting out (Corrà 2014)). Competition between these companies is considered to promote effectiveness and efficiency.

Reintegration tasks (like counselling, schooling and active assistance to find work) should, wherever possible, be actively contracted out to certified reintegration

11. Article 2.1.3 Wmo 2015.
12. Article 2.1.4 Wmo 2015.

companies. Under Article 11 of the SUWI Act specific requirements should be met that are similar to those imposed on the Occupational Health & Safety Agencies. A certificate can be applied for from the Minister.

In the municipal care domain use is made of diverse private care providers, for instance in the area of household help. This help is provided on behalf of the municipality. But the municipality cannot simply refer the citizen to private providers. These providers first have to be actively contracted by the municipality. In other words: the municipality continues to be fully responsible for arranging care, regardless of what is happening in the market.[13]

3.4.4 Supervision

The Inspectie SWZ (Social Affairs and Employment Inspectorate) is encharged with supervising the UWV, the SVB and the municipalities (social assistance). If there is evidence of serious failure regarding the legitimate performance of tasks, the Minister can issue an instruction for the performance to be adjusted. Failure to follow such an instruction can result in a reduction in the funds received from the Central Government.[14] In practice this hardly happens. Only one case of direct government intervention is known to have occurred, in the mid-20th century. In 1951 the Queen's Commissioner intervened extensively in the autonomy of the Groningen municipality of Finsterwolde, after administrative anarchy broke out under communist influence.[15] It is more common for municipalities to be placed under a form of preventive financial administration.[16] This happens when a municipality is running a structural deficit. In such a situation it has to have its budget approved beforehand by the province.

3.4.5 Financing

With regard to the municipal social facilities, like assistance and social support, municipalities are responsible for their own financing. To this end they are given budgets by the Central Government. These are financed from general taxation. Municipalities receive a separate block grant for social assistance benefits. This is referred to as the 'benefit budget'. Any budget surplus can be freely allocated by the municipality. At the same time municipalities have to make up for any budget shortage, at least in theory. Consequently, it is financially profitable for the local

13. CRvB 18 May 2016, ECLI:NL:CRVB:2016:1404.
14. Article 76 Pw.
15. JADB, 'Uit de oude doos: Finsterwolde', *Publiekrecht en Politiek* [website], 18 Sep. 2014, <www.publiekrechtenpolitiek.nl/uit-de-oude-doos-finsterwolde>, accessed 25 Feb. 2017.
16. Rijksoverheid, 'Overzicht gemeenten onder financieel preventief toezicht en artikel 12 gemeenten 2016', *Documenten – Rijksoverheid* [website], 14 Jan. 2016, <www.rijksoverheid.nl/documenten/publicaties/2016/01/14/overzicht-gemeenten-onder-financieel-preventief-toezicht-en-artikel-12-gemeenten-2016>, accessed 24 Feb. 2017.

government to help (or force) beneficiaries to find employment and to reduce benefit dependency.

In addition to the benefits budget there is an activation budget. This contains the means for the reintegration of people dependent on assistance, for youth care and for social support. The plan is for the participation budget to eventually be included in the general financing of the municipal fund. Until such time the funds in the integration budget can be allocated freely to finance any municipal task.

The funds are shared by the Central Government between the municipalities based on allocation ratios. A mathematical formula is used when doing this based on several social, economic and demographic indicators that are linked to the level of the municipal expenditure in the past. The municipalities are accountable to the Minister of Social Affairs and Employment with regard to the legality of the allocation of the funds received from the Central Government. If it emerges from this accounting that the budget has not been allocated lawfully, the Minister can demand back the budget in question, again in theory because there are not many precedents of such practice.

3.4.6 Decentralisation paradox?

Several paradoxical phenomena can be distinguished between the decentralisation targets and the central responsibility. In the first place, decentralisation is often accompanied by upscaling the size of the municipalities or their social administrations. Consequently local authorities do not get any closer to citizens but indeed the distance becomes greater, which makes it harder to suit support to local needs and makes customisation more difficult. Local area teams (*wijkteams*) which operate on a much smaller scale to monitor the needs of clients are supposed to bridge this growing gap.

In the second place, the latest round of decentralisation has introduced more freedom in relation to the municipal budget. Differentiation seems to be an explicit goal through, for example, giving the municipalities the power to draw up a bye-law on budget allocation. However, alongside these broader powers the Central Government has simultaneously drawn up national goals, from which it is apparent that the confidence in the municipalities is not unconditional. Also cut backs in the central block grants de facto limit the freedom at a the local level.

Thirdly, the role of the independent judiciary is not to be underestimated. The actions of the municipalities are subject to the General Law on Administrative Law, which includes standards for proper decision making. Also the main acts involved remain national acts. After 2015 the courts have frequently intervened in local policies which are thought to be contrary to general administrative rules or

the national acts, thus taking back much of the freedoms that local councils had claimed for themselves. For example, municipalities were not allowed just to abolish public home care and refer citizens to private home care providers, with possible financial support for those who are on social assistance.[17] Also they may not refuse care with the argument that non household family members should provide support.[18] Obviously, such standards detract from the ideal of fully individualised treatment stemming from what has been agreed upon around the kitchen table (Tollenaar and Vonk 2016).

4 The state of the debate and future perspectives

The recent decentralisations in the social domain embody a promise of another system
of social security in which the citizen is more actively involved and which is less expensive and less bureaucratic. However, in practice, this promise, which is also linked to the ideal of the civil society, is not well-based. Customisation is not always a realistic ambition when budgets are cut and the operations enlarged (Allers 2013). Furthermore, the strength of civil society can easily be painted in brighter colours than reality permits (WRR 2017). Also Municipalities are given room to be creative in making local policy, while at the same time they continue to be constrained by national regulations.

The Council of State, a constitutional advisory body, advocates restraint in intervention by the central government.

> *The accountability of the government for the functioning of the system as a whole must be clearly distinguished from the responsibilities it has under the legal system. These responsibilities must be respected unless legislative changes are made. The central government's accountability for the functioning of the system may not be used as an alibi for the government to intervene unilaterally in the way in which municipalities exercise their powers without regard for the basic principle of decentralization. The central government or the Lower House must 'intervene' with restraint. For this reason the Advisory Department of the Council of State recommends extreme restraint in initiating new legislation. In the coming years municipalities should be given the space to achieve the goals of decentralization in practice.*[19]

For a more critical stance on the recent decentralisation trend, we have to resort to scarce voices in academic literature. Some of these voices worry about the democratic shortcomings of the local welfare states (Duyvendak and Tonkens 2017), others fear that after many decades social assistance may lose its rights-based character and become, once more, solely an issue for local discretion (Vonk 2012). What-

17. Central Appeals Court 18 May 2016, ECLI:NL:CRVB:2015:1402-1404.
18. Central Appeals Court 11 January 2017, ECLI:NLCRVB:2017:17.
19. Council of State 2016, p. 8.

ever may be said about this, such criticism is not mainstream. The consensus of opinion rather highlights the beneficial effects which are expected from more local social powers. This attitude typifies the Dutch psyche. It is a 'polder country' in which parties share power and are constantly involved in discussions and seeking compromises. Thereby the credo of the interest of the general public is firmly on everybody's lips. The intention might have been more power for municipalities, but the Central Government has trouble letting go. The intellectual climate is susceptible for change. The latest trends follow one another with 'the pace of Atlantic weather fronts'. In the meantime, the house of Thorbecke stands as a monument. Decentralisation is a carrousel, a mad dance, which at its very best has not caused any serious calamities.

Devolution and decentralisation in social security: the situation in Slovenia

Luka Mišič and Grega Strban

1 Outline of the social security system

Slovenia is a social state governed by the rule of law.[1] The inclusion of these constitutional principles in a single article establishes Slovenia as a normative welfare state.[2] The *Sozialstaat* principle is not considered a mere political norm but a binding legal principle (Strban 2012a, 3), requiring the state to provide its citizens and other individuals who satisfy the necessary legislative conditions, with an adequate level of social protection. Article 50 of the Constitution, stipulating the right to social security, establishes a state obligation to regulate and ensure the proper functioning of mandatory schemes for health, pension, disability and other social insurance. The social security system is thus composed of public, mandatory and uniform social insurance schemes established to provide protection against traditional contingencies such as old-age, disability, sickness and accidents at work, unemployment and parenthood. The system is grounded in a Bismarckian type of social insurance reflecting the country's Austrian heritage (Kresal, Kresal Šoltes and Strban 2016, 22). State obligations are fulfilled through the establishment of insurance institutions in the health, pension and disability and unemployment insurance sectors. The establishment of these insurance institutions reflects the notion of functional decentralisation, i.e. the transfer of competences from the government or the state, to specialised public bodies,[3] which are allocated *administrative*, *limited normative*[4] and *distributive* functions. In the field of parental protection there is no functional decentralisation. The insurance institutions, whose key task is the distribution of funds gathered through the payment of contributions, (the

1. The most accurate, widely recognized term is the German term *Sozialstaat*. For a comprehensive theoretical inquiry see: Heinig 2008.
2. Detailed distinction between the social state and the welfare state in: Mihalič and Strban 2017, 634 and the following.
3. Cf. Pieters 2006, 16.
4. Insurance companies' regulations are limited to their implementing function. Rights and obligations of the insured individuals and other subject, their substance, beneficiaries, conditions under which a right can be claimed, etc. can only be stipulated by an act.

state being obliged to co-finance the insurance system)[5] are also subject to territorial decentralisation or deconcentration brought about by the establishment of local units and regional offices approximating their activities to the beneficiaries and ensuring the efficiency and effectiveness of their work.[6]

Articles 51 and 52 of the Constitution stipulate the right to healthcare and the rights of disabled persons. Special protection is awarded to family and children.[7] But the Constitution does not stipulate a direct right to *social assistance*. Article 50, which addresses the right to social security, refers only to social insurance. In this respect it mirrors the distinction between social security and social assistance found in international law.[8] However, under national legislation, social assistance is considered to fall within the (wider) notion of social security. The right to social assistance can also be derived from the social state principle (Article 2 of the Constitution), provisions safeguarding equality and non-discrimination (Article 14), and the right to personal dignity and security (Article 34). Nevertheless, when one considers the systematic placement of the right to social assistance, Article 58 and Article 7 of the Labour and Social Courts Act[9] are considered vital. Article 58 defines a *social conflict* as a legal dispute with regard to rights, obligations and legal benefits of natural, legal and other persons (if they can be holders of rights and obligations derived from *the social security system*)[10] in respect of which the social courts are competent. The court's jurisdiction, including both *social assistance* and *social care benefits*, is stipulated in Article 7. However, the very notion of a social care benefit is still open to discussion. Under previous provisions, the term *benefit* was used only for cash benefits, whereas under current legislation social care benefits include both benefits in cash and in kind, i.e. social services. Nevertheless, courts might still apply the older definition.

Setting aside the clear-cut definition of a benefit and the lack of a direct provision stipulating the right to social assistance, it can be argued that the lack of a system-

5. The level of financial commitments appears to be different when observing different branches of social insurance. On the one hand, it could be argued that this is a mere reflection of different wording in the legislation (lack of clearly stated financial obligations in the case of some Acts or insurance branches). On the other hand, differences could be interpreted as a reflection of conceptual divergences among different branches, e.g. a higher level of self-government and state-exclusion in the case of mandatory health insurance due to more tangible elements of social solidarity among the insured individuals.
6. There is a single insurance institution for each social insurance branch. This has jurisdiction over the entire territory of Slovenia.
7. See Articles 53 and 56 of the Slovenian Constitution, (*Ustava Republike Slovenije* – URS), Official Gazette RS, No. 33/91-I, last amended in 2016.
8. See Articles 12 and 13 of the initial and revised European Social Charter, Articles 22 and 25 of the Universal Declaration of Human Rights, Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights and the ILO Convention No. 102.
9. Labour and Social Courts Act (*Zakon o delovnih in socialnih sodiščih* – ZDSS-1), Official Gazette RS, No. 2/2004, last amended in 2017.
10. This is the single place in which Slovenian legislation refers to the notion of a *social security system*.

atic approach to long-term care and personal assistance both in legislation and in practice is a main shortcoming in the Slovenian social security system.[11]

2 State structure and general division of competences

Slovenia is a unitary, democratic state with a parliamentary system. Normative and administrative functions are divided between the government and municipalities as units of local self-government. These are bound together by the common needs and interests of the inhabitants[12] and they carry out tasks of local significance according to the principle of subsidiarity, either themselves or through representative bodies (i.e. the organisational element of local self-government[13]). The government delegates the decision-making process as close to the residents as possible (Brezovšek 2014, 6). The municipalities' *original competences* regard local issues that can be regulated autonomously and affect only residents. The government can also transfer *state obligations* or *competences* to municipalities if it provides the financial resources for such an arrangement.[14] Additional resources can also be provided by the government to economically weaker municipalities for the execution of specific tasks or programmes, investments, etc. Article 143 of the Constitution also allows for the establishment of regions as self-governing local communities managing local affairs of wider importance. However, as yet no Regions have been brought into being.

The municipalities' original competences are stipulated in the Local Self-Government Act.[15] The most important obligation regarding social security is the establishment of local public services within the framework of local administration, by means of public institutes and public enterprises, or by granting concessions to private enterprises.

The municipalities' formal and material acts are subject to governmental supervision. Where original competences are concerned, the executive branch monitors only their legality, but with regard to transferred or *derived competences* it also supervises their 'proper and competent performance.' Municipalities in that capacity namely represent a semi-autonomous extension of the governmental structure.

11. Personal Assistance Act (*Zakon o osebni asistenci* – ZOA), Official Gazette RS, No. 10/2017, (date of application: 01. 01. 2019) does not regulate long-term care insurance.
12. See Articles 9 and 139 of the Slovenian Constitution.
13. For organizational arrangements regarding local self-government in Slovenia see: Kukovič 2014, 5 and the following.
14. See articles 140 and 144 of the Slovenian Constitution.
15. Local Self-Government Act (*Zakon o lokalni samoupravi* – ZLS), Official Gazette RS, No. 72/1993, last amended in 2010.

Under the Local Self-Government Act[16] the municipalities can establish interest associations for the common implementation of administrative tasks and developmental and investment programmes, e.g. concerning the provision of services of general economic interests, spatial planning, public infrastructure projects. The rights and obligations of the participating communities are stipulated in the act founding the association. However, the Act does not actually contain any provisions to encourage municipalities to form such associations in practice.

3 Social security: more than a state of functional decentralisation

The Slovenian social security system, in its narrow interpretation excluding social assistance, is grounded in the notion of functional and territorial decentralisation or deconcentration, with competences in the field of social insurance transferred from the state to specialised public bodies. These are governed by representative and executive bodies comprising social partners' representatives and representatives of the state in varying numbers, depending on the insurance institution. The inclusion of such state representatives that not only act in the mere capacity of a public sector employer but in the capacity of the land's supreme political authority can be deemed legitimate whenever the state has a clear and substantive obligation with regard to co-financing the primarily contribution-funded scheme. The number of votes these representatives have in governing bodies reflects its obligations towards the scheme.

At the same time, the social security system contains only few if any elements associated with the notion of *devolution*, a state of assigning autonomous powers and competences to a state's territorial components.

In the case of social assistance and social services, which are included in the wider definition of social security under national legislation, a pattern of functional centralisation and deconcentration can be observed.

3.1 Health insutance

The Health Insurance Institute of Slovenia (HIIS) was established under the Healthcare and Health Insurance Act[17] in order to implement mandatory health insurance in a functionally and territorially decentralised system. The ten regional offices, however, lack any autonomous powers. These are reserved for the central office. Nevertheless, they do have both the right and the obligation to conclude

16. See Article 86. The interest associations should not be mistaken for municipal associations representing interests of local self-government in relation to the government. Such associations are regulated in Article 86 a. More on the establishment of interest associations in: Gotovac 2003, 69 and the following.
17. Health Care and Health Insurance Act (*Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju – ZZVZZ*), Official Gazette RS, No. 9/1992, last amended in 2013.

contracts with healthcare providers in their territory, following the general or umbrella agreement concluded between the HIIS, healthcare providers and the state (Kresal, Kresal Šoltes and Strban 2016, 63-64). The vast majority of competences with regard to public healthcare have been transferred from the state to the HIIS but not to other bodies. The HIIS concludes contracts with public and private healthcare (concessionaires) providers, forming the public healthcare system or public 'network' covering the territory of Slovenia and reflecting the Institute's administrative and distributional function. Insured individuals can claim medical services in the public system or 'network', whilst cash benefits are paid directly by the HIIS.

Municipalities have an important competence that could at first glance be interpreted as being in tune with the notion of devolution, although, strictly speaking, a transfer of competence within the state structure does not occur. Municipalities can establish public institutes such as primary health centres. They are also free to provide additional health services within their territory. The city of Ljubljana, for instance, has established a medical centre for disadvantaged individuals, such as homeless persons or foreigners who are underinsured, despite the fact that they are not associated with a mandatory health insurance scheme (Kresal, Kresal Šoltes and Strban 2016, 63). According to Article 8 of the Healthcare and Health Insurance Act, municipalities also have an obligation to develop, implement and finance programmes aimed at improving the population's health. They are also bound to establish programmes to promote a healthy environment and to finance investments in healthcare, as founders of public institutions. These obligations exist in addition to the general obligation to provide public services. Municipalities also grant concessions to private GPs operating in the public healthcare system.

When observing the status of municipalities in relation to healthcare, it is difficult to discover true elements of devolution. Where their *original competences* are concerned, i.e. the power to establish public institutes such as primary health centres, no transfer of competences occurs, since the state can always establish its own institutes. Equally, the establishment of a public institute and the granting of concessions to private GPs, can be characterised as a general authorisation or obligation, not a transfer of powers. If a particular municipality has no primary health centre, local authorities are obliged to ensure the availability of preventive and other primary healthcare programmes by concluding a contract, in cooperation with the HIIS, with another centre, medical station or concessionaire.[18] After the necessary conditions have been met, municipalities enjoy full autonomy in their undertakings with no element of devolution present. Similar conclusions can be drawn in relation to the establishment of pharmacies at the primary level: the establishment of these or the concessionary provision is stipulated by the Phar-

18. See Art 12 of the Health Services Act. The Act also prescribes the process of granting a concession.

macy Practice Act[19] as an obligation of (neighbouring) municipalities. A higher level of institutional coverage, e.g. a large number of primary health centres or pharmacies surpassing the average needs of the inhabitants, is left to the discretion of the local authorities.

3.2 Social assistance and family benefits

In the field of social assistance and family benefits, social work centres are the competent bodies operating in a functionally centralised, but territorially strongly decentralised system. A strongly deconcentrated system allows the social work centres' particular knowledge of the local environment to take full effect. In that sense they substitute municipalities as local communities with their particular knowledge of the socio-economic characteristics of a particular community or area. Such an arrangement, which ensures the link between the carrier or provider and beneficiary, as a rule leaves little room for a shift of competences from the state to the municipalities.

Social work centres are administrative extensions of the Ministry of labour, family, social affairs and equal opportunities. Currently, 62 social work centres are spread throughout the state territory, with 16 wider regional centres being added to the structure under the current reform taking place in this field. The applications will still be filed by potential beneficiaries at one of the 62 units, but they will however be processed at one of the 16 regional centres, with the aim of unifying administrative procedures and offering units more time and manpower to carry out and develop new social services. However, monetary and extraordinary monetary assistance, the right to pay mandatory health insurance benefits, the right to cover the difference up to the full value of a medical service and a number of other rights will remain within the competences of the units.[20] The regional centres will focus on, what can be safely said to be, the most numerous cases, i.e. cases regarding child benefits, kindergarten subventions, state scholarships and school-meal subventions. Professional services will remain within the competence of the units, with a mobile professional unit provided for every regional centre (MDDSZ 2018a).

Strong functional centralisation can be further observed when looking at the list of activities in the field of social assistance that are financed from the state budget. These include thirteen activities.[21] The municipal budget has to cover or share the expenses in only four cases with regard to the right to a family assistant, at-home assistance, institutional services for adults in cases of payment exemption and public social programmes.[22] This suggests that social assistance is considered a governmental or state affair, with the latter financing the vast majority of services and

19. Pharmacy Practice Act (*Zakon o lekarniški dejavnosti* – ZLD-1), Official Gazette RS, No. 85/2016.
20. Same applies to parental care and family benefits.
21. Article 98 of the Social Assistance Act.
22. Article 99 of the Social Assistance Act.

benefits from taxation. This is also partly confirmed by the Social Assistance Benefits Act,[23] establishing the core right to monetary social assistance as an obligation of the state. Equally, provisions set out in the Exercise of Rights from Public Funds Act[24] list municipalities as being the financiers of only a handful of benefits.

However, the situation in which municipalities have limited competences changes once they have fulfilled the few state-imposed legislative requirements[25] and when *local social assistance schemes* are established freely alongside the state scheme. However, as in the case of healthcare, one can speak of devolutionary elements only with great caution, since the imposition of a particular obligation upon the municipalities cannot be considered a transfer of powers. The same applies to local social assistance schemes, since they are established alongside the state scheme on a purely voluntary basis. Therefore state-independent and varied forms of social assistance only exist in larger and richer municipalities, possibly addressing the question of discrimination based on the place of residence. For instance, the municipality of Ljubljana can in accordance with the Decree on Monetary Assistance[26] grant monetary assistance to individuals permanently residing within the municipality and who are without income or whose income does not exceed (up to 30%) of the minimum income per family member prescribed in the ZSV. Assistance can be granted in the form of partial coverage of costs at the start of a school year for primary and secondary school children; school excursions and school-organised vacation; coverage of school meals; in cases of current material need; coverage of meals for individuals above the age of 65; childbirth assistance. The decree also stipulates in detail the amount of monetary assistance that can be given based on the purpose of its obtainment, the number of beneficiaries, etc.[27] In Maribor, Slovenia's second largest town, social assistance and benefit schemes and other incentives include one-time childbirth assistance, the right to free prescription for

23. Social Assistance Benefits Act (*Zakon o socialnovarstvenih prejemkih* – ZSVarPre), Official Gazette RS, No. 61/2010, last amended in 2016.
24. Exercise of Rights from Public Funds Act (*Zakon* o *uveljavljanju pravic iz javnih sredstev* – ZUPJS), Official Gazette RS, No. 62/2010, last amended in 2016.
25. The right to a family assistant is for instance (co)paid by the municipality where the beneficiary resides, therefore including its agents in the decision-making process, including a possibility of providing a formal opinion in the case. The Personal Assistance Act also establishes a municipal obligation to provide a social service of at-home assistance comprising household assistance, personal hygiene and assistance with social relations.
26. Decree on Monetary Assistance (*Odlok o denarni pomoči*), Official Gazette RS, No. 18/2008, last amended in 2012.
27. Since municipal monetary assistance is not explicitly listed in Article 12 of the Exercise of Rights from Public Funds Act, providing types of income that are taken into account when granting rights from public financial sources, it could be concluded that the latter is not considered and therefore exists fully independently of the state scheme. On the other hand, the provision does include the general term 'monetary social assistance', which could possibly also be applied to municipal social assistance. The latter however seems unlikely, since municipal social assistance was explicitly mentioned in Article 12 of the Social Assistance Benefits Act, before the amendment in 2013 still being the competent Act prescribing the types of income that are to be considered.

infant's and child's nutrition in case of certain social or medical indications and free public transport tickets for the disabled permanently residing within the municipality. In general, municipalities are also free to offer a number of subventions, e.g. for young families. They can also exempt their residents from paying local taxes on a means-tested basis, e.g. the compensation for the use of building land and can establish social housing programmes or act as guarantors for housing loans.

3.3 Long-term care

Due to the aforementioned lack of any systematic approach to long-term care, protection against this somewhat new and special social risk[28] is dispersed through a number of social services and benefits, such as family assistance, the right to a family assistant, institutional care, social service payment exemption, child care allowance, partial compensation of lost income and a variety of contract-based services that are not recognised as public services and are therefore financed by the *customer*.

In general, social services can be provided by legal entities and natural persons satisfying the conditions stipulated by the ZSV. Activities categorised as public services are carried out in a public network by public institutions and concessionaires. Some services are performed in a deconcentrated framework of social work centres, e.g. for-home family assistance, whilst at-home family assistance, comprising household assistance, assistance with daily tasks, and assistance with social relations, is provided by public institutions within the network. If the for-home service is provided within the network, at least one half of the service is to be financed by the municipality. In general, the public network offers the following services: social prevention, first social assistance (the right encompasses a first individual assessment and counsel to any individual facing social exclusion), personal assistance, for- and at-home family assistance, institutional care and guidance, care and employment under special conditions.

Municipalities are required to establish, develop and finance their own network providing at-home family assistance services,[29] but are free to establish public institutions, like, for example, the aforementioned primary health centres, to provide services within (e.g. institutional care) or outside the public network, such as companionship, hygiene care, or even pet care. Public institutions are financed by municipalities and in part by the users who might in some cases be eligible for

28. Cf. Strban 2012b, 211 and the following.

29. If a concession for providing at-home family assistance services cannot be obtained (e.g. the municipalities territory is already covered in full by a single provider), the service can also be delivered outside the public network, after the provider has obtained a special permission from the ministry. In such case the service has to be paid in full by the beneficiary now acting as a *customer* (MDDSZ 2018b).

payment exemption. As stated, services that are not considered public are financed by the customer.
As with social assistance, the freedom to establish public institutions and provide services outside the public network cannot be described as a state of devolution, since this relates to the voluntary undertakings of a municipality. After the municipality has fulfilled its obligation to establish a particular public institution, provide a particular service, or grant a concession, it is free to provide whatever additional services are deemed to be (economically) feasible in its territory.

3.4 Pension and disability, unemployment and parental care insurance

The three remaining branches of social insurance are merged in this final chapter due to reasons of practicality, since only little can be added to the discussion at hand with regard to how these insurance schemes are arranged. Apart from functional and regional decentralisation or deconcentration with regard to administration, limited regulation and distributional arrangements within the mandatory health insurance scheme there are few examples of the state transferring powers to bodies other than the specialised public bodies. The only municipal obligation is linked to the aforementioned right to a family assistant. Municipalities pay contributions under the compulsory family assistant scheme on the part of employers.
The case is similar with regard to unemployment insurance. The Unemployment Service of Slovenia is based on the notion of functional decentralisation and deconcentration, whilst, as with pension and invalidity insurance, the municipalities pay contributions under the compulsory assistants scheme on the part of the employers. The typical decentralised arrangement with regard to insurance institutions is departed from in the form of the municipalities' power to implement a public work programme with the intent to (re-) activate their unemployed residents. Municipalities can exercise this power after obtaining the consent of the Unemployment Service of Slovenia[30] and provided they finance the programme in full. An additional distortion of the decentralised framework is seen in the increased intervention and influence of the state in the administration of the system, also seen in the pension and disability insurance scheme. Such intervention limiting the level of insurance institutions' self-regulation or self-government (germ. *Selbstverwaltung*) is a result of enhanced state obligations towards the system and, possibly, less tangibility with regard to social solidarity shaping the relations between the insured individuals as members of the civil society.[31]

30. See Article 50, paragraph 4 of the Labour Market Regulation Act (*Zakon o urejanju trga dela* – ZUTD), Official Gazette RS, No. 80/2010, last amended in 2015.
31. Cf. Strban and Mišič 2018.

4 Social security in Yugoslavia: A state of devolution?

Since the disintegration of the Austro-Hungarian Empire, during which sickness funds operating in the territory of modern-day Slovenia enjoyed nearly full autonomy (Kresal 1998, 160), a steady path towards the centralisation of social security has been embarked upon.[32] After the establishment of the Kingdom of Yugoslavia, the Workers' Insurance Act (ZZD)[33] regulating mandatory social insurance financed by employees' and employers' contributions was introduced in 1922. This applied in all republics and covered almost every contingency resulting in the loss of income, such as sickness, pregnancy and confinement, occupational injury, disability, old age and death. It brought about a unified and centralised system of social security in a state grounded in different legal traditions (Kresal, Kresal Šoltes and Strban 2016, 22). The process of centralisation and unification reached different Yugoslav republics at different times, depending on their historical background. ZZD included a provision under which its effective use could be postponed until the 1 July 1925 (Kresal 1998, 164). Its implementation, allowing for further special insurance schemes raising the level of workers' protection (ibid, 166), was monitored from Zagreb, where the Central Insurance Office was located. At the level of the republics, ZZD was administrated through twenty local offices monitoring the employers, keeping records, prescribing and collecting contributions, ensuring healthcare at primary and secondary level and paying benefits (Zupančič Slavec 2009, 175-176). In this sense, the system was territorially decentralised or deconcentrated.

The local workers' insurance office was established in Ljubljana on 1 July 1922. This office administered and implemented social insurance in accordance with the ZZD from 14 May 1922 alongside existing Austrian Acts introducing mandatory hospital and accident insurance dating from 1887 and 1888 (Kresal 1998, 151). Insurance at and membership of this workers' insurance office was mandatory for all workers and civil servants, except those affiliated with a small number of other institutions, e.g. brotherhood funds for miners and metallurgists (Ibid., 177).[34] The office also had competences in the field of unemployment insurance. The Act regulating unemployment insurance was passed fifteen years later in 1937.[35] Old-age insurance was introduced in the same year.

A few years after the Second World War, between 1946 and 1950, social security legislation was amended, but social insurance remained a competence of the feder-

32. *Centralisation* in this particular context described as a shift of competences from the republics to the federation. The notion of *decentralisation* in this chapter more or less coincides with the notion of *devolution*.
33. Workers' Insurance Act (*Zakon o zavarovanju delvacev* – ZZD), Official Gazette of the Kingdom of SHS, No. 117, 30. 05. 1922.
34. Cf. Kresal 1998, 152.
35. More on historical developments regarding unemployment insurance until the Second World War in: Kresal 2006, 195-218.

ation, administrated centrally and financed from the state budget (Kresal, Kresal Šoltes and Strban 2016, 23). Pre-wartime institutions, some of which were of great importance at local level, were dismissed and the Insurance Institute of Slovenia, centralised and implemented within the framework of the National (federal) Institute, was established (Zupančič Slavec 2009, 177). In accordance with the Federal Act on social insurance of workers, civil servants and employees, passed in 1946, the National Institute for social insurance operated within the framework of the federal ministry with its affiliates spread through the republics (Kresal 1998, 177); a mere reflection of a deconcentrated but functionally centralised system not only with regard to the relationship between the federation and the republics, but possibly also with regard to the Institute's subordinate position in relation to the executive branch.

However, this kind of administrative arrangement was no longer in tune with the emerging policy of self-government or self-management.[36] Social security was therefore denationalised in the period between 1952 and 1954 and its financing was no longer dependant on the state budget (Kresal, Kresal Šoltes and Strban 2016, 24). Local social insurance institutions with regard to old-age, invalidity and health insurance were (re-)established in 1952 (Zupančič Slavec 2009, 177). Between 1954 and 1960, several important Acts were passed at federal level: the Health Insurance Act, Health Insurance for Farmers and the Employment Agency Act. As a result the social insurance schemes remained practically the same in all the Yugoslav republics until 1963 when a new constitution was adopted. This was followed by the federal Act on Organisation and Financing of Social Insurance that finally enabled individual republics in the regulation of their social security systems, bringing the system closer to a state of devolution.

After 1963, each branch of social security was administrated separately[37] by its own administrative bodies, renamed and reorganised as unions of 'self-governed communities of interest', later abolished in 1989 (ibid), long after social security had been completely decentralised (devolution) as a result of the last federal constitution drafted in 1974. The first Slovenian social insurance act was adopted in 1972, under the authorisation provided by the federal act (Kresal 1998, 177). The new constitution finally provided a basis for individual Yugoslav republics to pass their own legislation and form their own administrative bodies, a legislative change now fully in tune with the state of devolution, contributing to the fact that the Slovenian social security system was nearly autonomous in in 1991, when Slovenia became independent (Kresal, Kresal Šoltes and Strban 2016, 24).

In general it can be concluded (a comprehensive conclusion can only be achieved with an in-depth study of the legislation and administrative arrangements of individual republics and their relation to the federation throughout the country's

36. More on self-management in: Dieter Siebel and Damachi 1982.
37. Health insurance, old-age, and invalidity insurance were excluded from the unified social insurance in 1954, 1957 and 1958. Cf. Kresal 1998, 177.

development or decay) that a true devolution of social security in Yugoslavia occurred only in the 1970s, a period in which the republics obtained full powers and were able to pass their own legislation in the field of social security. A full shift of competences from the federation to the republics took place and social security became an exclusive competence of the republics as autonomous entities in the state structure. Before such transformation however, social security was either a fully centralised affair, with periods of only regional or regional and functional decentralisation in which the federation transferred key functions to the republics through national and semi-independent specialised public bodies. Nevertheless, republics might have possessed more autonomy in some periods than in others, depending not only on the federal legislation and functionally decentralised or even devolved formal arrangements, but also on the political preferences, ideologies or general climate in a particular period.

The pension and invalidity insurance scheme is an exception. The Act on the fundamental rights to old-age and invalidity insurance continued to apply in Slovenia until the disintegration of Yugoslavia in 1991.[38]

5 Conclusion

It can be concluded that the Slovenian system of social security, including both social insurance and social assistance schemes, is grounded in the notion of functional decentralisation and deconcentration with no visible elements of devolution. In cases where one might claim the presence of such elements, strictly speaking, no transfer of powers from the state to the municipalities as sub-units in the state structure has taken place. In social security, the state has transferred administrative, limited normative and distributional functions to insurance companies as specialised public bodies and retained its competences in the field of social assistance, exercised through social work centres in a functionally centralised, but deconcentrated system. Some tasks reserved for the municipalities, single units of local self-government, should be considered as mere obligations imposed on the municipalities as state extensions. With regard to additional municipal undertakings, the very fact that these are voluntary rules out any chance of the arrangement qualifying as devolved.

The main reason why the social security system lacks elements of devolution, possibly lies in the fact that Slovenia is a rather small country, both in terms of area (20,273 square kilometres) and the size of its population (just above 2 million inhabitants). The transfer of competences to lower organisational structures, such as regions or municipalities, would not necessarily improve the overall effectiveness of the system. On the contrary, such transfer would most likely only result in

38. For transnational historical developments and final years of Yugoslavia after its disintegration in 1991 see: Drapac (2010), Lampe (2000), Finlan (2004) and Ramet (2006).

more administrative costs. Similar reasoning lies behind the uniform structure of all branches of social insurance, with one insurance company established for each branch, covering all insured persons regardless of the type of employment.
No direct link between the current and the former Yugoslav system of social security can be found. To a large extent, social security became an exclusive competence of individual republics around twenty years before the federation's disintegration, with the Bismarckian heritage from the Austro-Hungarian Empire, however, lasting to this day.[39] It would seem that the Yugoslav experience of a constant shift in powers from the federation to the individual republics and back again has not played an important role with regard to the current system.

39. The case is however different in regard to developments of the pension and invalidity insurance schemes. As aforementioned, pension and invalidity insurance remained regulated by the federal Act on fundamental rights from the old-age and invalidity insurance till disintegration in the year 1991. Thereby it strongly influenced new Slovenian legislation drafted in 1992, cf. Bubnov Škoberne 2000, 168.

Devolution and decentralisation in social security: the situation in Spain

Borja Suárez Corujo

1 A general picture of the Spanish social security system and its administrative organisation

The Spanish public system of social protection is based on four main pillars with their corresponding institutions: Social Security, healthcare, long-term care and social assistance (including therein social services). The principal pillar is what we could identify as Social Security in its strictest sense. Following the pattern of a continental social insurance model, Social Security is channelled through a dual scheme of benefits in cash. An unambitious non-contributory scheme (*nivel no contributivo*) modestly covers old-age, invalidity, family benefits and unemployment assistance. It works on a means-tested basis and is financed through general revenues, representing 11% of total spending. However, the most relevant part by far is the contributory scheme (*nivel contributivo*). Mainly financed through contributions paid by employers and employees and accounting for almost 90% of total Social Security spending, this professional scheme provides for benefits in cash to compensate for the manifestation of a social risk. These benefits come in the form of retirement, invalidity and survivorship pensions; 'incapacity for work' benefits during sickness, maternity, paternity and other related personal circumstances; unemployment benefits, due to job loss (or time work reduction); and family benefits linked to the needs of family units.

This contributory level is divided into a 'General scheme' covering wage earners subject to Labour Law; and some 'special schemes' for specific types of workers. This largely refers to the self-employed, but also coal mining and sea workers. In addition, there are 'external special schemes' covering (some) civil servants and military personnel.

Benefits in kind are provided by the second and third pillars: healthcare, through the National Health System (a coordinated set of health services for which public authorities are legally responsible) and long-term care, through the System for

Autonomy and Care for Dependency. For their part, social services – and social assistance benefits – are offered in a generally disordered manner without any system as such.

The administrative organisation is different in each of these four pillars. For the purpose of this article, the most relevant aspect is that the roles played by the State and the Autonomous Communities (and local entities) vary according to the institution concerned.

2 The state of 'devolution' (political decentralisation)

2.1 Brief historical remarks

The territorial organisation of the state has been one of the most controversial and thorny issues in recent Spanish history, at least since the 19th century. Linked to processes of modernisation and seeking (certain) social justice, Spain saw two serious attempts at political decentralisation on the occasion of the proclamation of the First and the Second Republics.

The first republic was an ephemeral period (1873-1874), during which for the first time a republic was declared as a form of government, alongside a federal territorial organisation prone to 'cantonalism'. The second republic (1931-1936), was a more moderate period ending with a frustrated attempt at political decentralisation. Despite the constitutional definition of Spain as an Integral State compatible with the autonomy of the Municipalities and the Regions (Article 1 1931 Constitution), and the approval of the Catalan Statute of Autonomy (1932), the territorial issue became one of the key controversies that weakened the new democratic regime, giving way to a military coup led by Franco and other generals.[1]

The seemingly never-ending Franco dictatorship (1939-1975) was characterised, apart from the lack of rights and freedoms, by a rigid centralism and a harsh hostility towards 'regional'[2] nationalism. After the restoration of democracy following the dictator's death, the draft of a new democratic constitution faced as a major obstacle the territorial organisation. The 1978 Constitution (SC) seemed to be an intermediate solution between federalism and unionism reminiscent of the last republican experience. Unexpectedly, at least to some extent, the political steps taken in the following years gave birth to the so-called State of Autonomous Communities.

1. Cf. Tomás Y Valiente 1996.
2. The term 'regional' in this paper refers to Autonomous Communities.

2.2 Constitutional setting

2.2.1 The State of Autonomous Communities: general characterisation

As a cornerstone of the territorial organisation, Article 2 SC declares '… the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards…'. But such a clear-cut statement, contained in the Preliminary Part, is balanced by the recognition and guarantee '… of the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all'. This ambiguous constitutional provision – which enshrines two antagonistic concepts, unity and autonomy – is later developed by the polemical Title VIII, under the title 'Territorial Organisation of the State'.

To begin with, our attention should be drawn to two important provisions. One is Article 137 where it is foreseen that the State is organised territorially into municipalities, provinces (both already existing in 1978) and Autonomous Communities '… that may be constituted', all of which '… shall enjoy self-government for the management of their respective interests'. But the scope of self-government is not the same in every case. Basically, the type of autonomy attributed to local entities is administrative – limited to executive and regulatory functions –, whereas Autonomous Communities' autonomy has a political dimension through the exercise of legislative power.

Along these lines, the recognition of the right to self-government goes further in the case of Autonomous Communities. Article 143.1 establishes that '… bordering provinces with common historic, cultural and economic characteristics, island territories and provinces with historic regional status may accede to self-government and form Autonomous Communities…'. These bodies are subject to their correspondent Statute which fixes '… the basic institutional rules of each Autonomous Community' (Article 147), within the terms of the Constitution, including the distribution of competences between State and Autonomous Communities (Articles 148 and 149).

This theoretical design of the territorial and political organisation was indeterminate: an open constitutional model (Tornos Mas 2013, 521). We have seen a transition to a system of territorial autonomy from a centralised State. The State of Autonomous Communities is articulated through a system that attributes competences to the state bodies: State (central or general Administration) and Autonomous Communities. The cornerstone of the exercise of self-government is the so-called 'block of constitutionality' (*bloque de constitucionalidad*) made up of the constitutional provisions concerning this right and each of the Autonomous Communities' Statute of Autonomy.

These Statutes have a double legal nature (see Article 147.1 SC) they lay down the main institutional rules in the ('autonomous') territory; and determine an integral part of the State's legal order. From this perspective, four key aspects are to be highlighted.

Firstly, the articulation of the State of the Autonomous Communities is based on a 'dispositive principle', a right that is granted to all 'nationalities and regions' and by virtue of which the autonomy of each Autonomous Community is to be specified in its Statute of Autonomy (Fossas 2007). In practice, full use of this faculty has extending self-governing power to the entire Spanish territory, giving birth to a total of seventeen Autonomous Communities.

Secondly, each Statute of Autonomy contains a set of legislative and/or executive powers, competences, that enable the Autonomous Community to adopt its own policies. This explains why, contrary to local administration, a real political autonomy is enshrined here.

A double limitation constrains the Statutes' content. One lies in the two-step process of approval, first at the Autonomous Community's level through its Parliament; and then at the national level by way of an 'organic law'. The other regards the specific limits established by the Constitution, particularly those related to the distribution of powers and to the idea of the unity of the Spanish nation (Quadra-Salcedo Janini 2004, 136), already mentioned.

Finally, a fourth aspect refers to the fact that no homogeneity among the Autonomous Communities is guaranteed; on the contrary, diversity is deep-rooted in this territorial organisation, without prejudice to the principles of solidarity and territorial equality recognised by Article 138 SC and the equality of citizens in all State territories (Article 139 SC).

This range of characteristics gives rise to the claim regarding the federal dimension of Spain's territorial organisation[3]. The controversial connotation that this term still has, makes it impossible to reach an agreement on the model classification, a modest step that could favour pending reforms. Nevertheless, it is undisputed that the degree of political decentralisation is very high.

2.2.2 The development of the State of Autonomous Communities

Until very recently the process of constructing the State of Autonomous Communities has been a story of success (López Basaguren 2013, 395). Starting immediately

3. Biglino Campos 2013, 449 speaks of 'a system of devolved federalism'. De Carreras Serra 2013, 483 highlights the skeleton of the structural elements common to a federal state, arguably except for the Senate.

following the enactment of the Spanish Constitution, the initial stage saw a drive towards the generalisation of political decentralisation between 1981 and 1992. The passing of the (ultimately seventeen) Statutes of Autonomy followed two different paths. The 'fast track' (Article 151 SC) by way of which the 'historical nationalities' (Basque Country, Catalonia and Galicia, plus Andalusia) would form their own Autonomous Community and the 'slow track' to be followed by the rest of the Autonomous Communities with, in principle, more limited powers.

This difference gave rise to a second stage of levelling and development between 1992 and 2001. By virtue of a pact on territorial autonomy signed by the socialist PSOE and conservative PP, competences attributed to the 'slow-track' Autonomous Communities were standardised and extended to encompass those competences enjoyed by the 'historical' nationalities.

The third stage (2002-2010) can be considered an attempt at integration. The turn of the century, and especially the change of government that took place in 2004, opened a new period during which statute reform was encouraged or, at least, not restrained. In most cases, this process of readjustment and modernisation of the statutes was successful: this was referred to as the 'second generation' of Statutes of Autonomy.

Contrarily, much more delicate in political terms were the reform trajectories of the Basque and Catalan Statutes, very different in conception, content and final result. The Basque 'Ibarretxe Plan' proposed the right to self-determination as an associate State, which was rejected by the Spanish Parliament in 2005. Meanwhile, the highly controversial process of reform of the Catalan Statute was nevertheless ratified by both the Catalan and the Spanish Parliaments and even by the Catalan people in a referendum in 2006. But the 'long-awaited' Judgment of the Constitutional Court (CCJ) 31/2010 on Catalonia's new Statute of Autonomy made the current legal framework unsustainable as it partly upheld the petition for a declaration of unconstitutionality of very sensitive aspects. That event marked a turning point in the successful experience of the Autonomous State (Solozábal Echevarría 2013, 468).

2.3 The division of competences between the layers of government in the State of the Autonomous Communities

2.3.1 A general approach

Before analysing the provisions which deal specifically with Social Security, it is appropriate to give a brief overview of how competences are distributed between State and Autonomous Communities given the uniqueness of this in federal (or decentralised) states.

As a starting point, competences with regard to specific matters reserved for the State are listed in Article 149.1 SC, whereas the rest may be assumed by the Autonomous Communities through their Statute of Autonomy. Additionally, those matters that are not expressly assigned to the State by virtue of the Constitution may fall under the jurisdiction of the Autonomous Communities by virtue of their respective Statutes of Autonomy. In other words, the list of competences attributed to the Autonomous Communities' in Article 148 SC is merely illustrative, since additional competences can always be assumed as long as these are not reserved to the State under Article 149.1 SC. Finally, matters that are not provided for in the Statutes of Autonomy fall within the jurisdiction of the State (Article 149.3 SC). The high potential for conflict is obvious.

It should also be observed that the process of adapting the social protection system (Social Security included) to the territorial organisation is unfinished. This is because of two problematic premises. The first is that despite the content of the constitutional provision on Social Security (see below), in practice this is treated as a competence of the State. The second it that, healthcare aside, the social policy pursued by the Autonomous Communities is channelled through 'social assistance', even though this displays different characteristics.

In fact, this approach based on the 'retreat' of the Autonomous Communities from the field of Social Security worked to a certain extent while the communities were financially capable of improving their social policies. In this respect, a gradual extension of social protection was seen thanks to economic growth (unfortunately linked in part to the housing bubble) providing extra resources. This precarious development was not exempt from problems, the two most significant ones being the existence of serious territorial inequalities (not so much constrained by the level of wealth of the Autonomous Communities, but by the political commitment of the 'regional' governments) and, above all, the insufficiencies of protection to cope with continuing social needs.

But it was the outbreak of the crisis which clearly showed all the weaknesses associated with this way of organising social protection at the Autonomous Community level (Del Pino and Pavolini 2015, 251). Coupled with the problems we have already mentioned, the adverse economic juncture laid bare three major difficulties: the vulnerability of Autonomous Communities to cutbacks given their poor

financing condition[4]; their inability (shared with local entities) to attend to a huge and rising proportion of citizens in need; and the paradox that the State finds itself in a difficult position – not only in financial terms, but also in legal terms – when facing urgent social situations.

2.3.2 Division of competences in Social Security (in its strictest sense)

Article 41 SC provides that '(t)he public authorities shall maintain a public Social Security system for all citizens which will guarantee adequate social assistance and benefits in situations of hardship, especially in cases of unemployment'. Who are the public authorities that are responsible for this?

The answer is found in Article 149.1.17 SC which establishes the division of competences in the field of Social Security, here understood as benefits in cash provided by the Administration of Social Security, therefore excluding healthcare (see Articles 149.1.16 and 148.1.21 SC), social assistance (Article 148.1.20 SC), social services and long-term care. According to this constitutional provision, the State holds exclusive competence over 'Basic legislation and the financial system of Social Security, without prejudice to implementation of its services by the Autonomous Communities'.

Before tackling the problems of interpretation of its content, it is clear, apparently, that Social Security is a shared matter from the perspective of distribution of competences: the State is given responsibility for the basic legislation and the financial system of Social Security; whereas the Autonomous Communities may assume responsibility for implementing Social Security services and (although implied, not explicitly stated) the non-basic legislation in the same field (Fargas 2003, 1731).

This formal division is not followed in practice, which means, in practice, that Social Security is an exclusive competence of the State. Obviously, the consequences are not minor in terms of the role played by the Autonomous Communities in the social field. On the one hand, this shuts the door on them as far as legislation on and implementation of Social Security are concerned; as an exception, the Autonomous Communities are responsible for the management of non-contributory pensions. On the other hand, this arrangement shifts the activities of Autonomous Communities regarding social issues under the scope of Social Assistance, a problematic trend that causes malfunctioning and creates confusion.

4. The current financing system (Basque Country and Navarra excluded) was regulated by Act 22/2009 based on the increased transfer of central government taxes to the Autonomous Communities, more regulatory powers for the latter in order to expand their capacity to decide on the composition and volume of their revenues, and the creation the creation of common funds with specific goals. Today it is widely shared that an update is urgently needed (Comisión de Expertos 2017).

Constitutional Court case law on the interpretation of Article 149.1.17 has clearly reinforced the role played by the State by extending, perhaps beyond its limits, the functions explicitly attributed by the Spanish Constitution: basic legislation on Social Security and the financial system thereof. Because basic legislation is a compulsory framework (essential content) set down by the State for the Autonomous Communities, some scope of action appears to be reserved for these Communities when dealing with Social Security. The very detailed content of the General Law on Social Security (Royal Legislative Decree 8/2015), a cornerstone of the system, shows that there is no room for non-basic Social Security legislation because such a concept is based on a broad interpretation of the second state function, responsibility for the financial system of Social Security.

In this respect, under the established case law of the Constitutional Court,[5] it is understood that this concept embodies every aspect regarding Social Security which is (in)directly connected to economic contributions or the benefits granted. Such an interpretation is grounded in two guiding principles despite its 'merely' legal, not constitutional, dimension. One is the principle of financial solidarity; the other is what is commonly-known as the 'single fund' principle. Both point to the idea that contributions paid by employer and employees, as well as other funds coming from the State, belong to the Social Security system, no matter what the territorial origin is. On reflection, this rule is perfectly compatible with the role of Autonomous Communities in the management of contributions and benefits, or with the 'regional' decision to spend its own resources on extending protection in its territory.

However, the actual interpretation of the Constitution's wording on the financial system of Social Security leaves no scope for action for Autonomous Communities, in spite of the constitutional provision[6]: there is no non-basic legislation, nor do the Autonomous Communities play a role in the implementation of Social Security, with the already mentioned exception of the less significant non-contributory pensions. In this respect, it is very significant that ten out of the seventeen Autonomous Communities' Statutes do not assume – meaning, do not even mention – this function.

2.3.3 Division of competences in healthcare

The right to health protection is recognised by paragraph 1 of Article 43 SC. Paragraph 2 remarks that '(i)t is incumbent upon the public authorities to organise and safeguard public health by means of preventive measures and the necessary benefits and services', adding that '(t)he law shall establish the rights and duties of all

5. CCJ 124/1989 and 195/1996.
6. Critically on this issue: Suárez Corujo 2006a, 31.

concerned in this respect'. Again, the identification of those 'public authorities' is a key aspect regulated in Title VIII. Nevertheless, this 'autonomous' ruling signals the separation between both matters: Spanish Social Security does not cover healthcare, which is provided by the National Health Service.[7]

In sharp contrast to the division of competences in the Social Security field, the role attributed to the Autonomous Communities in healthcare is much more relevant, up to the point that generally speaking citizens have the (inaccurate) perception that healthcare is a public service exclusively provided by the Autonomous Communities.

By virtue of Article 149.1.16 SC, the State holds exclusive competence over two main aspects related to healthcare. The first regards the 'bases and general coordination of health matters', whereby it limits its scope to determine the common framework (bases is equivalent to 'basic legislation') and to guarantee that the State holds the function of coordination: it entails the establishment of standards determining the minimum conditions and requirements, in pursuit of a basic equality of conditions in the operation of the public healthcare services. Implicit in both cases appears to be the recognition of a salient role played by the Autonomous Communities in healthcare provision, which is consistent with the constitutional attributions of powers.

More specifically, the second reference attributes to the State the 'legislation on pharmaceutical products'. In this case, the attribution is clear-cut since it covers the whole competence, making it less troublesome to draw the line between the competences assumed by the Autonomous Communities and those reserved to the State.[8]

On top of such provision, Article 148.1.21 SC specifically recognises the Autonomous Communities' ability to assume competence over 'health'. Consequently, without breaching the function attributed to the State by Article 149.16 SC, all Statutes of Autonomy foresee the role of Autonomous Communities in the organisation and management of public healthcare services (Garrido Cuenca 2013, 103).

Stepping down from the constitutional level, we see that healthcare provision is channelled through the National Health System, which can be presented as a coordinated set of health services provided by the 17 Autonomous Communities that combines all healthcare functions and benefits for which public authorities are legally responsible. In observance of the constitutional provisions examined, the

7. CCJ 98/2004, 33/2017 and 97/2017.
8. CCJ 201/2016.

State is responsible for designing the general framework of healthcare. This task has been fulfilled by two major legislative initiatives, *General Health Act 40/1986* and *Act 16/2003, on cohesion and quality in the national health system*. By virtue of these, the basic content (common to all Autonomous Communities) of healthcare is set up with regard to the determination of insured persons,[9] forms of healthcare (general practitioner, specialist, hospital care) and common services portfolio.[10] Simultaneously, legislation regarding pharmaceutical products fully corresponds to the State that exerted this power to pass *Royal Legislative Decree 1/2015 on guarantees and rational use of medicines and health products*.

As previously pointed out, the actual provision of healthcare is carried out through the network of Health Centres in the Autonomous Communities (except for Ceuta and Melilla, where the National Institute for Health Management is the responsible body), which are also entitled to establish a supplementary services portfolio. Note that healthcare funding is embedded in the general financial system of the Autonomous Communities,[11] accounting for a third of total social expenditure.

2.3.4 (Division of) competences in social assistance and social services

There is no division of competences in social assistance. Whereas Article 149 SC does not assign any role to the State in this respect, Article 148.1.20 SC provides that the Autonomous Communities may assume competence over 'social assistance'. Under this provision, all Statutes of Autonomy assign full competence (regulation, organisation, management) on this matter to the Autonomous Communities.

Despite this clear-cut design, the exercise of these competences by the Autonomous Communities has been very controversial because of the tricky disputes with the State Social Security. The boundaries between these two concepts are blurred, not so much due to the delimitation of Social Security, but mainly owing to the difficulties in defining social assistance.

In that respect, the starting problem is that there is no definition (neither constitutional nor legal) of social assistance and, arguably, the attempt at clarification made by the Constitutional Court has not been convincing so far. According to established case law,[12] social assistance is characterised as public social protection (healthcare and long-term care excluded) that is financed by taxes and does not

9. CCJ 136/2012, 33/2017 and 63/2017.
10. Further on this issue, cf. Delgado del Rincón 2016.
11. A certain amount per inhabitant ('adjusted population') is allocated to each Autonomous Community in order to provide for basic social services (healthcare included). But 'regional' governments have the ability to increase their revenues and, more relevant in practice, decide their distribution among those services (Cuenca 2016, 6).
12. CCJ 146/1986, 70/2013, 18/2016 and 9/2017.

belong to the Social Security system. But the problem is that the second characteristic is really the outcome and the first one is not defining since the non-contributory scheme of Social Security is likewise financed by taxes, not contributions.

Taking into account the type of measures implemented by the Autonomous Communities, we ascertain that, in general terms, benefits granted by Autonomous Communities – and charged to them – to cover social needs are presented as social assistance. Only in those cases where the initiative enters the domain of Social Security invading State competences would these assistance initiatives be problematic. Consequently, Autonomous Community social assistance covers any kind of traditional social aid, but also more elaborate (in the sense of Social Security-like) benefits, including minimum income schemes,[13] additional benefits to non-contributory Social Security pensions[14] and social services.[15] Attention must be focused here.

Notwithstanding that, Article 148 SC only refers to social assistance as a (potential) competence in the exclusive hands of the Autonomous Communities, all Statutes of Autonomy assume the competence on social services. But in practice local entities have traditionally played a prominent role in their provision. On the grounds of the constitutional guarantee of 'local autonomy' – self-governing of municipalities – enshrined in Article 140, and the recognition of the State competence to establish the bases of the legal system of local public administration (Article 149.1.18 SC), social services are a typical function carried out by the local entities with a modest secondary role played by the Autonomous Communities. Nevertheless, since the approval of *Act 27/2013 on Rationalisation and Sustainability of the Local Administration* the subordination of the local corporations to the Autonomous Communities has been reinforced (Arenas Viruez 2016, 80).

2.3.5 Division of competences in long-term care

In abstract, the constitutional grounds for regulating long-term care services are not clear. The Spanish Constitution does not contain any reference to this matter. But whether we consider it to belong to the purview of Social Security, social assistance or even healthcare is a key aspect in order to attribute functions to the State and/or the Autonomous Communities.

Before 2006, long-term care services had been randomly and modestly provided by local entities (in certain cases involving 'regional' governments). The Central Government's decision to tackle this serious social need by setting up a new protection

13. All Autonomous Communities have some sort of minimum income scheme (cf. European Commission 2014).
14. Validated by CCJ 239/2002. Cf. Vida Soria 2003, 407.
15. CCJ 31/2010.

system raised the debate on the constitutional grounds of this initiative. Aimed at involving both the State and the Autonomous Communities in the governance of the system, the (central) legislative power came up with an original solution to determine the framework of the division of competences. 'Trapped' in a centralist idea of Social Security, it moved away from this purview to invoke unexpectedly[16] Article 149.1.1 SC, by virtue of which the State holds exclusive competence over the '(r)egulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties'. As a horizontal clause the said constitutional provision should not be used as a substitute for the lack of State competence.[17] However, it gives way to a 'peculiar' distribution of functions (though indirectly validated by the Constitutional Court),[18] which does not reflect the competences corresponding to Social Security, nor to healthcare or social assistance.

Along these lines, the leading role is played by the State. Act 39/2006 creates the so-called 'System for Promotion of Personal Autonomy and Assistance for Persons in a Situation of Dependency' regulating the general framework of long-term care services as an 'autonomous' type of social service divided into three levels of long-term care.

In this design, the Central Government is responsible for the first minimum level of guaranteed protection and assumes part of its funding (1.2 billion in 2016, 20% of total spending). But the State law did want to deeply involve the Autonomous Communities, a role that cannot be conceived in the case of (State) Social Security. Closer to the division of competences on healthcare, long-term care is provided through the network of social services under the supervision of the Autonomous Communities, regardless of the key function played by local entities. The financing of the second level of guaranteed protection (currently suspended) is shared by both central and 'regional' bodies (the State provides for the same amount of resources as the Autonomous Communities do depending on the number of beneficiaries and its grade of dependency). For its part, a third level of protection can be offered by the Autonomous Communities at their own expense.

2.3.6 Division of competences: recap

This brief overview of the constitutional framework shows four different solutions in terms of division of competences, depending on the branch of (public) social protection we are dealing with.

16. Cf. a critical analysis in Suárez Corujo 2006b.
17. See CCJ 61/1997 and 52/2013. As Viver 2013, 456 mentions '(t)he State's abundant spending power is one of the spheres wherein may be found repeated examples of the application of Art. 149.1.1 to cover acts of mere execution in policy areas where it lacks other competences'.
18. CCJ 18/2016. See Suárez Corujo 2016, 131.

First, benefits in cash granted by Social Security (in its strictest sense) are fully attributed to the State (Article 149.1.17 SC). Second, both the State and the Autonomous Communities participate in the provision of long-term care services (benefits in cash, frequently as an alternative) [Article 149.1.1 SC]. Third, healthcare services are mainly provided by the Autonomous Communities without prejudice to the role played by the State in certain aspects (Articles 148.1.21 and 149.1.16 SC). And social assistance by means of benefits in cash or social services are exclusively provided by the Autonomous Communities, with the involvement of local entities particularly with regard to social services.

Almost forty years after the enactment of the 1978 Spanish Constitution, how should we assess this process of decentralisation of the public social protection system? Can we speak of consistency? Or is it more appropriate to denounce the lack of adaptation to the territorial division of power?

The spectacular transformation of the Spanish Welfare State institutions throughout this period must be acknowledged. And, in this sense, it would be inaccurate to interpret the conflicts arising from the constitutional distribution of powers as forming a major obstacle in the process towards political decentralisation.

However, we ascertain today that our public system of social protection is not fully in line with the current territorial political organisation and the original constitutional design. Four brief comments are pertinent.

We can name the first one the *exception*. Truly, the complicated division of competences between the State and the Autonomous Communities with regard to healthcare has not hindered the consolidation of a decentralised but united National Health System offering relatively satisfactory services in general terms. In fact, the most serious problems suffered by the system in recent years are not related to power distribution, but caused by the cutbacks resulting from the process of fiscal consolidation in the context of a critical economic juncture and the austerity-driven policy.

The second remark expresses a sort of *paradox*. Because having ascertained that the lack of distribution of competences in Social Security is not in accordance with Article 149.1.17 SC, it is undeniable that Social Security has played a key role in guaranteeing a minimum level of income throughout the economic crisis. At the same time, it is also true that the first signs of an inability to tackle future challenges were seen before the onset of the crisis.

Thirdly, the overwhelming presence of the State through Social Security has generated *confusion* in the interpretation of social assistance. The most 'advanced' ways

of protection implemented by the Autonomous Communities (in terms of legal guarantees) have really nothing to do with precarious old protection techniques more typical of charity. At this point we are classifying as 'social assistance' actions taken by the 'regional' governments which could arguably fall within the scope of (complementary) Social Security; and simultaneously that interpretation appears to be decisive in blocking any State action, no matter how exceptional and one-off they might be.

Finally, the fourth comment regards certain *frustration* generated by the tortuous constitutional ground invoked to regulate the new system of long-term care. Despite the fact that the main reason for the freezing of its setup is financial (i.e. budgetary cutbacks), this somewhat artificial division of competences has stirred up mistrust between the different layers of government hindering an adequate development based on cooperation.

3 The state of (administrative) decentralisation

3.1 Brief introduction: historical remarks and constitutional setting

Since 1978, the process of (administrative) decentralisation has been overshadowed by the process of devolution (political decentralisation). But the truth is that administrative decentralisation is a necessary instrument to bring welfare – as well as other services – to the citizens. In that respect, it is important to bear in mind that, alongside the Autonomous Communities, Spain is organised territorially into municipalities (more than 8,000) and provinces (52), according to Article 137 SC. This constitutional provision adds that all these bodies shall enjoy self-government for the management of their respective interests.

As a matter of fact, stemming from the content of the Constitution, the role played by municipalities and provinces as local entities is not equally important. On the one hand, Article 141 SC basically restricts itself to recognising that the government and autonomous administration of the provinces shall be entrusted to Provincial Councils (*diputaciones provinciales)* and also to attributing a clearly subordinated role to the State ('… carry out the activities of the State'). On the other, Article 140 SC explicitly '… guarantees the autonomy of the municipalities' whose government and administration shall be incumbent on their respective Town Councils (*ayuntamientos*).

Along these lines, *Act 7/1985, governing the bases of the local regime* reinforced the role played by municipalities to the detriment of the provinces. Since then, the ongoing development of the Autonomous Communities' institutions and the subsequent self-governing prerogative has not stopped but in a sense has limited the

functions carried out by municipalities and threatened to bury the provinces. In (an arguably expected) turn, *Act 27/2013, on the rationalisation and sustainability of local government* accounted for a resolute movement towards the restriction of municipality autonomy in favour of the Autonomous Communities and provinces. As we will see, this has been corrected by the Constitutional Court.

3.2 Functional decentralisation versus territorial decentralisation

As professor PIETERS (2006, 15) reminds us, it is one thing to draft social security legislation and another to implement it and have it administered. Apart from the intervention in collecting economic resources (contributions in this case), this administrative dimension is determinant in the effective enjoyment of the social benefits granted. In this section, we will give a brief overview of the main administrative bodies that intervene and how they are organised in terms of decentralisation in a two-fold perspective: functional and territorial. Each institution has its own administrative organisation.

3.2.1 Social Security

Social Security administration is integrated by specific administrative bodies with certain tasks, namely collecting and managing funds, and granting and distributing benefits. It is, therefore, a public administration, although part of it (around ten percent) is entrusted to non-profit entities called *Collaborative Mutual Societies with the Social Security System*. Subordinated to the Ministry of Employment and Social Security, the main body is the Secretary of State for Social Security, in charge of managing, planning and supervising bodies and common services of the Social Security.[19] But a role is also played by the State Public Employment Service (SEPE) that belongs to the Secretary of State for Employment within the same Ministry, being responsible for administering unemployment benefits. Still another body, belonging in this case to the Ministry of Health, Social Services and Equality, can be mentioned: the Institute for Elderly and Social Services (IMSERSO), under the Secretary of State for Social Services, administers, with the Autonomous Communities, pensions paid under the non-contributory system to elderly and disabled people (and certain related social services).

19. Its structure can be presented as follows. Alongside the General Directorate of Social Security Organisation, the Social Security Public Accounts Department, and the Social Security Administration Legal Service Department, there are three management bodies: the National Social Security Institute (Instituto Nacional de Seguridad Social, INSS), which grants cash benefits provided for by all schemes (except for sea workers, non-contributory old-age and disability allowances, unemployment benefits) and all family benefits; the General Treasury of the Social Security (Tesorería General de Seguridad Social, TGSS); which keeps registration records of companies, employees and self-employed, monitors their employment status, and collects SS contributions and pays out all benefits; and the Social Marine Institute (Instituto Social de la Marina, ISM), which manages the special scheme for sea workers.

As far as territorial decentralisation is concerned, the Social Security system is based on agents of central government that are geographically dispersed. In particular, Provincial Directorates are the administrative bodies responsible for the exercising of the correspondent tasks (significantly, social contribution collection and benefit grants).

More complex is the functional decentralisation. Most of the benefits are granted (and paid) by bodies depending on the Secretary of State for Social Security (mainly, the National Social Security Institute and the General Treasury of the Social Security). But a more specialised intervention is also seen in the following terms.

Firstly, as already mentioned, unemployment benefits are managed by the Secretary of State for Employment (State Public Employment Service). Secondly, non-contributory pensions are managed by the Autonomous Communities (and the Secretary of State for Social Services through IMSERSO) though paid by the General Treasury of Social Security. Thirdly, professional risks are largely managed by the Collaborative Mutual Societies with the Social Security System, non-profit private business organisations, under the supervision of the Ministry of Employment and Social Security, aimed at managing, for example, healthcare and social benefits (incapacity for work allowance and permanent disability pension) associated with work-related accidents and occupational diseases. Finally, from this functional perspective note the role played by employers in collecting employee's contributions and paying short-term benefits in certain cases.

3.2.2 Healthcare

The National Health System can be presented as a coordinated set of health services provided by the Autonomous Communities. In terms of administrative organisation, at the top of the system we find the Interterritorial Council of the National Health System, a body which is responsible for the coordination and cooperation among the central and 'regional' health administrations. More importantly, each Autonomous Community has its own health service: administrative and management bodies responsible for all the health centres, services and facilities in its territory within the general framework designed by the State's legislation.

The organisation of each Autonomous Community health service is territorially decentralised through two administrative categories: basic health zones, responsible for primary care; and health areas, covering specialised care and hospital care.

3.3.3 Social services (and social assistance)

There is no national public system of social services, but seventeen 'systems' at an Autonomous Community level that has the corresponding legislative competence.

In practice, and with noticeable variations depending on the individual Autonomous Community, the administrative organisation (also responsible for social assistance benefits) is structured according to a two-fold guideline. In functional terms, a distinction is usually made between the basic social services and the specialised services; whereas the territorial organisation covers all the administrative layers starting from 'regional' entities, through provincial entities in cases of multiprovincial Autonomous Communities to local entities. Exceptionally other criteria are implemented. Differences in administrative organisation are the main feature of social service provision.

3.3.4 Long-term care services

Following a more systematic approach, the administrative organisation is (partly) designed by the State legislation (Act 39/2006). The System for Autonomy and Care for Dependency is conceived as a multilevel organisation wherein the three layers of Public Administration (State, Autonomous Communities and local entities) play a role. The law creates a Territorial Council of the System for Autonomy and Long-Term Care, a key body, integrated by representatives of the State and the Autonomous Communities, aimed at developing the general legal framework and encouraging cooperation. For their part, Autonomous Communities are responsible for dependency assessment, and the granting of benefits and service provision – tasks carried out through their own network of (mostly local) social services.

4 The state of the debate and future perspectives

Leaving aside the less controversial issues related to the administrative decentralisation of Social Security, an assessment of the process of political decentralisation and its impact on public social protection in Spain must take into account two contradictory, at least in appearance, premises.

Firstly, it is impossible to understand the accelerated modernisation and economic progress achieved by the Spanish society in the last four decades without the so-called State of the Autonomous Communities. In direct contrast with the depressing rigid centralism typical of Franco's dictatorship, decentralisation has been one of the key elements upon which the consolidation of an advanced welfare state in a democratic system has been possible, and remains a distinctive and probably inalienable feature of it today.

And secondly, this successful, even exemplary, experience in terms of democratisation and social cohesion has been achieved despite the most serious and persistent problem, along with unemployment, that Spain has suffered in its modern history: the problematic dimension of the nationalist claims, namely, ETA's former terrorist

campaign (Basque Country) and unilateral actions towards independence (Catalonia).

Focusing on the latter, it is doubtful that this major territorial crisis that threatens the political integrity of the State is related to the division of powers in the social protection system, let alone its administrative organisation. But it could be argued that recent clashes in this field have not contributed in any way to solving the political problem, and even have aggravated the difficulties that welfare state institutions are going through.

4.1 Threats?

Two major issues threaten the stability of the (public) social protection system in the Spanish State of the Autonomous Communities: one is the recent trend of recentralisation fostered by the Central Government and, perhaps in a more hesitant way, by the Constitutional Court; and the other is the political instability associated with certain expressions of territorial nationalism.

To begin with, the context of fiscal consolidation has launched a clear trend of recentralisation giving more power to the State at the expense of the Autonomous Communities and, in certain cases, municipalities. Seeking, at almost any price, the reduction of social expenditure as the main instrument to lower public deficit, the Central Government has concentrated its short-term efforts on social benefits (care services included) granted by 'regional' and local entities. Three actions should be highlighted.

Firstly, in recent years a growing number of State laws seek competence to the detriment of Autonomous Communities on horizontal titles such as Article 149.1.1 SC (regulation of the basic conditions guaranteeing the equality) or Article 149.1.13 SC (bases and coordination of general planning of economic activity). This attempt at keeping – totally or partially – within the State purview certain matters in the social field is well illustrated by the already mentioned regulation on long-term care and the programme of extraordinary assistance for the long-term unemployed.

Secondly, the approval of Organic Act 6/2015 is to be considered a resolute action by the State to restrict Autonomous Community expenditure on healthcare.
The new legal framework limits the margin of action of Autonomous Communities through the creation of an instrument for the sustainability of the 'regional' Government expenditure on healthcare and pharmaceutical products. But arguably it breaches the distribution of competences on this specific matter and, more generally, the principle of autonomy enshrined by the Spanish Constitution: the financial

support of the Central Government is subject to the adherence to said instrument which implies the legal commitment of limiting the variation of healthcare and pharmaceutical expenditure regardless the potential decisions taken by 'regional' governments to increase their resources.

And thirdly, the autonomy of municipalities in providing social services under the coverage of Articles 140 and 149.1.18 SC has been seriously curbed. *Act 27/2013* was passed in order to limit municipalities' role merely to the assessment and gathering of information on cases of social need, as well as the urgent attention of persons at great risk of social exclusion (Article 25.2). The outcome is that today, according to the Law, the regulation and management of social services corresponds, in principle, to the Autonomous Communities. In this case, this is the channel used by the Central Government to reduce/control social expenditure.

An additional worrisome aspect is that this controversial trend of recentralisation has been, in general terms, supported by the Constitutional Court.[20] Following a broad interpretation of the concept of basic legislation and – above all – the financial system of Social Security (article 149.1.17 SC), constitutional case law has continuously held a strict line whereby it exclusively grants the State the regulation and management of the Social Security system. Undoubtedly, this consolidated interpretation has very effectively dissuaded the Autonomous Communities from developing initiatives in the field of social assistance that could in some way interfere with the Social Security system and limited the approval of complementary legislation by said Communities in the field of healthcare (CCJ 134/2017). On its part, a somewhat more recent issue is the validation of the extensive use of horizontal norms of competences: namely, CCJ 18/2016 regarding the State regulation on long-term care based on Article 149.1.1 SC; and CCJ 100/2017 concerning the competence basis (Article 149.1.13 SC) for the regulation of the last extraordinary programme for the long-term unemployed.

With that said, it is true that in very recent times the Constitutional Court would seem to have softened this 'hard-line' interpretation in favour of the State. Showing greater awareness of the Autonomous Communities interests, the Constitutional Court has reinforced the role attributed to 'regional' governments in the field of social assistance to compensate the use of the spending power by the State (CCJ 9/2017 and 70/2013). In a thorny way, it has also defended the Autonomous Communities' competence to manage the economic benefits associated with the extraordinary programme for the long-term unemployed (CCJ 100/2017). Likewise, in a landmark judgement (CCJ 41/2016) the Court has stopped the State's attempt at

20. Historically, it limited the central government's use of its spending and legislative powers (Colino and Del Pino 2014).

shaping how Autonomous Communities organise territories and the role played by local entities in providing social services.

There is a second block of threats stemming from claims of territorial nationalism. The Basque Country has since the eighties demanded for an autonomous Social Security system. In the more recent proposal made by the ruling Basque Nationalist Party,[21] such an aim would be gradually achieved in two phases. The first one, arguably having no serious drawbacks, asks for the management of Social Security, basically meaning collecting funds and granting benefits in its territory. Whereas the roughly outlined second phase seeks to set up an autonomous system of Social Security which entails the claim on the ownership of the funds and on the ability to establish requirements to have access to benefits. Being one of the wealthiest territories in Spain, there is a real threat to the basic principle of solidarity, also among territories, upon which the Spanish Social (Welfare) State is constitutionally set up.

The claim from Catalonia is quite different. Historically, the deeply-rooted Catalan nationalism has not made such an open demand regarding Social Security. In general terms, that position was not altered throughout the process of creating the 2006 Statute of Autonomy. Management and certain margin to supplement (State) Social Security benefits were its main claims. But the context radically changed when the independence challenge gained momentum from 2012. Thus a heated debate on the sustainability of the Social Security system in an independent Catalonia has been raised.

4.2 Opportunities?

The magnitude of the threats to Social Security in a politically decentralised country such as Spain should not hide the existence of opportunities: the deepening of decentralisation features in the field of Social Security could constitute an effective way of consolidating the Spanish Welfare State as well as enabling it to face present and future challenges. Two main remarks are to be made.

First and foremost, a revision (legal or case law) of certain aspects of the division of powers, especially those concerning Social Security in its strictest sense, might be useful to fulfil two priorities: to keep political cohesion and to improve the quality of the Spanish Welfare State in the following terms.

This political cohesion could be achieved through the attribution of Social Security management to the Autonomous Communities; along with the ability to supplement the basic level of Social Security benefits provided by the State. As a whole,

21. Cf. PNV 2015.

this could be judged as a way of enabling the Autonomous Communities to develop their own social policy in this field, which could be particularly significant for territorial nationalism as a way of deepening the federal nature of the Spanish State.

This movement, not exempt from risks, could be accompanied by two positive side-effects for the Spanish Welfare State. On the one hand, favouring the establishment of 'regional' supplementary benefits would be a useful instrument to preserve the adequacy of pensions and other social benefits and to cope with the historical omissions and insufficiencies of our model. Obviously, this would entail territorial differences that could possibly raise tensions; nonetheless, such inequalities are, in principle, consistent with a federal characterisation of the system if the State basic level guarantees a decent level of income. On the other hand, this more salient role played by the Autonomous Communities in attending to social needs through Social Security might reinforce the ability of the State, as a whole, to face the major challenges in terms of sustainability. In other words, given the extraordinary effort that public authorities will foreseeably have to make in an ageing society, the involvement of the different layers of government appears to be the only way to reasonably cope with this.

More briefly, a revision of the 'State-biased' division of powers in the field of Social Security could solve the lasting doubts about the legitimacy of the State to promote new social benefits in sensitive areas such as social services and basic minimum benefits. So far, the prevalent interpretation of the constitutional division of competences has led to a situation in which the action of the Autonomous Communities regarding these matters is clearly insufficient – with alarming differences between territories – compounded by the fact that the State does not even have the ability to intervene as this falls within the purview of 'regional' social assistance. The point is that a more decentralised idea of Social Security would favour the establishment of a basic regulation (on social services or basic income) at State level which the Autonomous Communities would be entitled to develop to the benefit of the citizenship.

Devolution and decentralisation in social security: the situation in Sweden

Titti Mattsson and Elin Osbeck

1 A general picture of the social-security system and the administrative structure

Social-security legislation was first introduced in Sweden in the late 19th and early 20th century. The literature on this topic suggests a number of different reasons for this timing. It was widely recognised at the time, for instance, that persons who relied on earnings from work for their upkeep needed some kind of insurance against loss of income. For a number of different reasons, namely, a loss of income could easily arise – among them sickness, a work-related accident, or the death of a wage-earner in the family. Some scholars point to the impact of the idea of 'social citizenship' here.

As a consequence, insurance against loss of income emerged in Sweden as early as in the late 19th century. It took the form initially of private funds financed by periodic fees. Members of the funds were thereby insured against sudden loss of income due to illness, a work-related accident, or the like. The funds were run by unions and tradesmen's associations. Some aspects of this insurance, such as terms of eligibility for joining the funds, were regulated by acts of Parliament in 1891 and 1910. At this point, membership of the funds was voluntary. Then, in 1931, a new act increased the element of state control and centralisation, by reducing the wide variety of sickness funds into one main fund for each municipality. Later, in 1947, the Universal Compulsory Sickness Insurance Law was introduced. Membership in this case was mandatory. The first period, in other words, was characterised by voluntary participation and private organisations; the following one by mandatory participation and public organisations.

During the first few decades of the 20th century, reforms were introduced in other areas of social welfare as well. Housing benefits, for example were introduced in the 1930s; and general child benefits – for supporting families and encouraging reproduction – were introduced in the 1940s. The numerous reforms of the time

were based on the idea that the state was responsible for the welfare of citizens, and that it should act accordingly. Many of the general principles on which Swedish social security is based today were developed during this period and the years following. The underlying idea was that social security should be universal, and that it ought to promote equality. All citizens, for example, must enjoy a 'reasonable standard of living'. This is a social right which the Social Services Act is supposed to guarantee to all residents of Sweden still today.

2 Devolution of government

2.1 Remarks on the historical background

During the 16th century, under the rule of Gustav Vasa, a relatively modern and centralised nation-state began to take shape in Sweden. The monarch in this period had great power. Subsequently, however, the Swedish parliament (the *Riksdag*) acquired substantial influence, balancing the power of the king. The early parliament, known as the Parliament of the Estates (the *Ständerriksdag*), provided for the participation of four societal groups: the nobility, the clergy, the burghers, and the peasants.

In 1809, a constitution known as the Instrument of Government was introduced in Sweden. The Parliament of the Estates continued until 1865, when it was replaced with a two-chamber system. This two-chamber system was then abandoned in 1971; now the Swedish parliament has just one chamber. A few years later, in 1974, a new constitution came into force.

It may be noted that there are four constitutional laws in Sweden. They are the Instrument of Government (Regeringsformen) from 1974 (mentioned above), the Act of Succession (Successionsordningen) from 1810, the Freedom of the Press Act (Tryckfrihetsförordningen) from 1949, and the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen) from 1991.

The 1974 Instrument of Government – the central constitutional document and the relevant constitution for this chapter – sets out the overall organization of the Swedish state and furnishes the fundamental protections for democracy, human rights, and the rule of law. According to this constitution, Sweden consists in geographical terms of local and regional authorities. These are known as municipalities at the local level, and as county councils at the regional level. These authorities enjoy self-government.

Local self-government has deep historical roots in Sweden. The first steps towards it were taken in the 1860s. There were three different kinds of municipality ini-

tially: cities, market towns, and rural municipalities. The greatest challenge faced by the rural municipalities was to take care of their impoverished population.

With the societal changes of the early 20th century, and the concomitant establishment of a more modern and industrial society, the tasks of the local and regional authorities changed. The goal now was to build up the 'People's Home' (the *folkhem*), meaning the Swedish welfare state. It bears stressing here that the self-government enjoyed by local and regional authorities was by no means absolute. In certain respects, in fact, they operated more or less as local arms of the central government. Nor is their self-government absolute today, as we shall see below.

2.2 Constitutional setting

The current Swedish constitution – the Instrument of Government (SFS 1974:152) – came into force in 1974. Up until that date, the 1809 Instrument of Government had formally applied. However, the last fifty years of the constitution of 1809 have been termed 'the half century without a constitution'. During those years, namely, the king no longer exercised the considerable powers which he continued formally to possess. Moreover, for much of the period prior to the enactment of the new constitution in 1974, Sweden's constitution was the oldest still in force (formally) in Europe.

In 2011, several revisions to the 1974 Instrument of Government took effect. To some extent, the constitution was updated in order to reflect current conditions. Protection against discrimination, for example, has been extended to cover sexual orientation. The language was also made gender-neutral, as well as easier. Other revisions concerned the role of the Council on Legislation (the *Lagråd*),[1] which was strengthened; and the independent status of the courts, which was highlighted. The new text also makes explicit reference to Sweden's membership of the EU, the UN, and the Council of Europe.

According to the Instrument of Government, local and regional authorities in Sweden enjoy self-government. One important change in the Instrument of Government, relevant to the topic of this chapter, was the formalisation of the relationship between the central government and the local and regional authorities. Actually, an entire chapter was introduced to this end. Three of the six paragraphs in this chapter were simply moved there from other chapters, but three new ones were introduced, in order to clarify both the rights and the obligations of the local and regional authorities. The main purpose of the change was to call attention to the important role of these authorities in Sweden. The new version of Chapter 14 states

1. The authority which examines bills the Government intends to submit to Parliament.

that the power of decision within these authorities lies in the hands of elected assemblies; that said authorities handle local and regional matters on the basis of the principle of local self-government; that limitations on their self-government ought not to exceed what is necessary in view of the goals of the limitation in question; that said authorities may levy tax in order to fulfil their duties; and that they may be obliged to help defray the costs of other such authorities, if such be necessary in order to achieve equivalent economic conditions.

2.3 Division of competences between levels of government

2.3.1 Structure of government

As mentioned above, the Instrument of Government states that Sweden has local and regional authorities, and that these enjoy self-government. Traditionally, certain policy areas have been the exclusive responsibility of the central government, with no role for local or regional authorities. Security policy, military defence, and foreign policy are such areas. However, the line is not always clear between local self-government on the one hand, and the central government's conduct of security policy on the other. A recent matter illustrated the possible collision of local self-government and central state authority in this area. The municipality of Karlshamn, on the southeast coast of Sweden, wished to allow Nord Stream 2 (the Russian gas-pipeline project) to store pipes at its port. Although what happens at the port of Karlshamn is a local matter, the potential security risks involved made the matter an issue for the country's military and foreign-policy posture, and thus a concern for the central government. Initially, the government opposed to the project, and informed the municipality that it considered the project to risk to the safety of the country.[2] This may be said to illustrate the tension between local self-government and the government's exclusive authority.[3]

Other areas are more mixed or complex. Legislation and taxation are examples of areas where the different levels of government – the central on the one hand and the local and regional on the other – act in parallel. Only the central government in Sweden may *legislate* (i.e., enact law). Local authorities can also set legal rules, but these are termed *local regulations*. In the event of a norm conflict between legislation and regulation, the former takes precedence. Local regulation is also limited in the sense that, according to law, there are some areas which local and regional authorities cannot regulate. They may not, for example, set the terms of their own authority, competence, or organisation.

2. See www.svt.se/nyheter/inrikes/live-regeringen-om-ryska-gasledningen, retrieved 31 March 2019.
3. Ahlin, Per (2017), 'Regeringen ska sköta utrikespolitiken', *Förvaltningsrättslig tidskrift*, 2017:3.

Both the central government on the one hand, and local and regional authorities on the other, can tax citizens. 'State income tax' is levied by the former, 'local income tax' by the latter. Under the terms of the Local Government Act (SFS 2017:725), local and regional authorities may tax their 'members' in order to fulfil their duties. An individual is a 'member' of a municipality if he/she is registered there, owns property there, or is taxable there. A person is a member of a regional authority if he/she is a member of a municipality within that regional authority. It is open to question, however, just how autonomous local and regional authorities are in practice, particularly when it comes to setting tax rates for their members. In an effort to halt a trend towards rising tax levels in local and regional authorities during the 1990s, the central government imposed limits on local income tax. These limits were repealed later, but they pointed up the tension between local self-government and central-government authority in this area.

2.3.2 Division of competences in regard to social security

How then, broadly speaking, is the structure of Swedish government reflected in the division of competences in the area of social security? Traditionally, social security has been a matter for the central government. In our remarks on the historical background in sections 1 and 2.1 above, we touched on the early years of the welfare state. The 1970s, however, saw the start of a trend to grant greater competence to local and regional authorities in the country. In the 1990s, these authorities were given still greater responsibilities in a number of areas, such as education, elder care, and care for the disabled. The division of competences in this field thus presents a mixed picture, and the answer depends on what kind of social security is being discussed.

In the 1970s, a number of parliamentary acts assigned broader responsibilities to local and regional authorities in the area of economic support for citizens. The updated Social Services Act (SFS 2001:453) was and still is considered a 'framework act' – meaning that by means of it, the central government lays down a framework of goals for social-security policy. It is up to local and regional authorities, however, to decide how these goals are to be reached. The Social Services Act is 'general' legislation dealing with a number of matters. These include the right of all residents of Sweden to enjoy a reasonable standard of living; the right of vulnerable groups like the elderly and the disabled to receive care; etc. The Social Security Code (SFS 2010:110), another central piece of legislation, provides for economic support to individuals who are unable – due to illness, unemployment, parental obligations, or other reasons – to obtain their income on the labour market.

It is also important to bear in mind the relationship between the social-security benefits provided by the state and those offered by the trade unions. The state provides a minimum level of security, but this minimum can be 'topped up' in various

ways, such as through collective agreements or other benefits of union membership. Additional benefits of this kind include extra sick days, longer parental leave, and the like. Some collective agreements also provide insurance of various kinds. Many individuals, therefore, enjoy a higher level of social security than the minimum furnished by the state.

Health care is another mixed and complex area where the division of competences is concerned. However, the division here does not go between the central government on the one hand and local and regional authorities on the other; rather, it goes between local authorities and regional authorities. A new Health and Medical Services Act (SFS 2017:30) took effect in July 2017. However, most parts of the older version of this Act, from 1984, have simply been transferred into the new one. For example, there are no changes in the division of responsibilities for health care. Regional authorities are responsible for the main part of Swedish health care today, including all advanced health care (*sjukvård*) provided at hospitals. They are also generally responsible for providing other types of health care (outside hospitals) to their residents. The municipalities, on the other hand, are responsible for 'nursing care' (*omvårdnad*) on a less advanced level and for certain groups. In particular, they are responsible for care of the elderly and of the disabled. It was in the 1990s that responsibility for care of these two groups was divided between the two levels of government. Prior to that time, most of the responsibility for health care lay in the hands of regional authorities. We shall discuss the division of responsibility for these two groups further below.

According to the Law regulating Support and Service to Persons with Certain Functional Disabilities (SFS 1993:387), responsibility for health-care services and other support is divided between the municipalities and the regional authorities. The former are responsible for consultation and other personal support of the kind requiring special knowledge of the problems and living conditions of individuals with major and lasting disabilities. Daily support for such persons is often closely linked to health care. Health care of the kind requiring the help of a medical doctor, on the other hand, is the responsibility of the regional authorities. In other words, the municipalities are responsible for other kinds of health care and support. Thus, municipal responsibilities include organising personal assistance, furnishing economic support for such assistance, making contact persons available, offering short stays outside the home, and providing a number of other services. Furthermore, the Social Services Act (SFS 2001:453) charges the Social Welfare Committee within each municipality with ensuring that individuals with physical, mental, or other disabilities are able to take part in society, to hold a meaningful occupation, and to occupy living quarters that suit their needs. To this end, municipalities are to arrange accommodations with support and services suitable for such persons.

Under the terms of the Social Services Act (SFS 2001:453), municipalities are also responsible for health care (of the kind not demanding a medical doctor), as well as for support and services for the elderly. The task of the above-mentioned Social Welfare Committee is to ensure that elderly individuals are able to lead autonomous lives under safe conditions, and to enjoy an active and meaningful existence shared with others. To this end, the Committee is to ensure that such accommodations are offered to the elderly as meet their needs; and that such persons are provided with nursing, care, and other such support as they may require. Municipalities are also responsible for staying informed about the living conditions of seniors in their area. Due to demographic trends in Sweden, elder care is a rapidly growing area of the national care system, and its economic burden on the municipalities is increasing.

According to the Education Act (SFS 2010:800), the municipalities are responsible for education. In this context, 'education' refers to nurseries, nursery school, elementary school, elementary school for pupils with disabilities, upper-secondary school, upper-secondary school for pupils with disabilities, adult education, special adult education, and spare-time education. Prior to the 1990s, the central government was responsible for education. In that decade, however, the task was transferred to the municipalities. This relatively recent change is the subject of constant debate in Sweden. Critics of the current system argue that the task is 'too difficult' for the municipalities. They further claim that local financing results in inequalities between different geographical areas – a problematic matter, since education is a national rather than a local concern.

2.3.3 Local responsibility, or solidarity between different local and regional authorities?

Under the terms of the Local Government Act (SFS 2017:725), local and regional authorities may tax their members in order to fulfil their duties. Of course, different areas may have different socio-economic structures, and thus a stronger or weaker economic base for taxation. This can result in rather variable conditions for the fulfilment of the duties in question. In order to reduce inequalities between different local and regional authorities, the better-off authorities must assist the less favoured ones. This policy is sometimes referred to as the 'Robin Hood Tax', since it transfers resources from richer areas to poorer ones. This may indeed solve the immediate problem of lack of funding for poorer areas; however, the transfer of resources entailed is not uncontroversial. Due to the debate on this subject, and the demands which have been made for reforms in this regard, current arrangements may not represent a permanent solution to the economic difficulties faced by poorer authorities.

3 Decentralisation of government

3.1 Remarks on the historical background

In section 1, we reviewed the history of the Swedish welfare state briefly. That presentation was mostly chronological. In this section, by contrast, our review is theme-based rather than chronological. Over the course of the welfare state's development during the 19th and 20th centuries, a few different themes can be distinguished. One theme is *economic support* (i.e., cash benefits). Support of this kind may be means-tested. Or it may be universal, as in the case of child allowances. Support may also take the form of insurance, for covering sudden losses of income that can strike for various reasons. Another theme is the provision of *services*, such as nursing care for those unable to attend to their own needs (such as children, the elderly, and the disabled); as well as *active measures* of other kinds. A closely connected issue is *health care*.

In the late 19th and early 20th century, the Swedish parliament enacted several laws for the support of workers who suffer a loss of income. The late 19th century saw the establishment of insurance against loss of income due to sickness. As we mentioned in our introduction, this early legislation built on private organisations and voluntary participation. Subsequent legislation was based on the opposite: public organisations and mandatory participation. In 1947, for example, the Universal Compulsory Sickness Insurance Law was introduced. Membership of the fund in question was mandatory.

In 1911, Parliament passed legislation providing working mothers with some economic protection, for a four-week period after the birth of a child. The legislation was far from adequate, however. Women had to join a fund in order to obtain the benefit in question, and it was up to the fund to decide whether or not to provide support to a given mother. As a result, only about a seventh of those in need were actually granted economic support. Subsequent legislation in the 1920s and 1930s for support to mothers did not improve their situation much.

These, then, were two historical examples of benefits for the replacement of income lost (in the one case due to illness, in the other due to childbirth). In general, it can be said, legislation from the early 20th century up to the mid-1940s aimed at providing a 'safety net' for persons who relied on income from work for their upkeep.

In its early stages, state-organised care for the elderly involved both active measures and means-tested economic support. Prior to the 20th century, care of the elderly was considered a family responsibility. The 1809 Instrument of Government did declare that the state bore some responsibility for citizens in need, but respon-

sibility for the provision of care continued to rest with families until the early 20th century. In practice, this meant grown-up children were responsible for the care of their elderly parents. Almost always, moreover, this task fell to female members of the family. In 1918, the Poverty Care Act was introduced. Though not obvious from its name, the Act concerned the care of impoverished seniors in particular. Care was only to be offered if the individual in question could not get help from elsewhere. The support it provided, moreover, was means-tested. The underlying idea was that individuals were primarily responsible for their own upkeep. Those who applied for support had to submit to a fairly thorough examination and assessment. The 1918 Act may be said to have involved a mixture of active measures and economic support, inasmuch as it offered both care and accommodations on the one hand, and economic support for impoverished seniors on the other. Only individuals in a precarious economic situation were eligible. In 1947, however, means-testing was abandoned. Citizens would now be afforded the opportunity of living in elder-care homes according to their need for *care*, rather than according to their need for economic support.

Child allowances were first introduced in 1937, on a means-tested basis. Ten years later that was changed. Since 1948, therefore, child allowances have been a classic example of a universal benefit in Sweden, handed out to all parents irrespective of their economic standing. The aim initially was to encourage reproduction.

3.2 Constitutional setting

The Instrument of Government states, in Chapter 1, Article 2, that the 'personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favourable conditions for good health.' Although phrased in a manner suggesting a set of individual rights, this paragraph is instead to be understood as a set of general goals for public activity. Thus, while public institutions should certainly try to achieve these goals, they cannot be sued if individuals are out of work, are forced to leave their home, or are unable to attend the educational institution of their choice. This 'goal-setting paragraph', then, is unenforceable. Yet it is not unimportant. Indeed, it might be thought to impose a limit on local self-government – i.e., as requiring that local and regional authorities take concrete measure to achieve the goals in question.

3.3 Functional decentralisation versus territorial decentralisation

The general principle is that the authority exercised by local and regional bodies in Sweden is territorially based, but the situation in that regard is not clear-cut. This is

most clearly illustrated by the role of the county administrative boards. These bodies represent the central government within each county, and their function is to coordinate the activities of the state therein. They are tasked with ensuring that all residents of the county in question receive local services, that companies and authorities in the county comply with laws and regulations, and that objectives chosen by the central government for the nation as a whole are duly pursued by the various agencies and authorities within the county. Other duties include coordinating certain activities in connection with areas of national concern, such as housing, integration, transport, infrastructure, gender equality, animal protection, social development, the environment, the labour market, and the business community.

3.4 Power at the local level

3.4.1 Introduction

According to the Local Government Act, local and regional authorities may handle matters of public interest connected to their geographical area. The two central principles set out in the relevant paragraph concern the general competence of these authorities on the one hand, and the so-called localisation principle on the other.

Let us begin with the general competence of these bodies. For a given action to fall within the general competence of a local or regional authority, it must be appropriate, reasonable, and the like that for said authority to deal with the matter. According to case law, it is not sufficient that a given action not violate a public interest. It must also be carried out in pursuit of a public interest connected to the authority in question.

According to the localisation principle, the action of a local or regional authority must also have a connection to the area served by that authority. It is neither necessary nor sufficient, however, that the action be performed within the borders of said authority. The key point is that the matter be *connected* to the authority or its members; and also that it not be a matter attended to solely by the central government, another local or regional authority, or other body. As mentioned above, for example, local and regional authorities may not handle matters over which the central government has exclusive competence, such as defence, national security, and foreign policy. Local and regional authorities must also treat their members equally, unless there is objective cause not to do so. Finally, unless extraordinary reasons dictate otherwise, they may not make retroactive decisions detrimental to their members.

In addition to the rules on competences which it lays down, the Local Government Act states that other acts as well set out specific competences and obligations for local and regional authorities. The Social Services Act does so, for example. One important element here, not least from the standpoint of devolution, is that local and regional authorities can hand over some of their operations to other bodies, including private companies. The Act on System of Choice in the Public Sector (SFS 2008:962) is relevant here – see section 3.4.4.

3.4.2 Policy

National provisions on the powers of local and regional authorities do allow them, to some extent, to set stricter standards in particular areas. One such area is housing, where such authorities may impose technical requirements for property – regarding the use of energy, for example – which are more stringent than those featured in the national building rules. The same applies in connection with traffic standards, cleaning schemes, and local order statutes.

As mentioned above, moreover, national legislation allocates certain powers to local and regional authorities in specific policy areas. Such provisions often leave them room to set their own standards. Areas where this applies include tourism, youth activities, and work and activities for the disabled. Other provisions regulate actions by such authorities outside their own territory or in connection with commercial matters (e.g., electric-power generation and trade, or the management of sewer plants in other municipalities for commercial reasons).

3.4.3 Assessing claims and providing services

The Instrument of Government states, in Chapter 14, Article 2, that 'the local authorities are responsible for local and regional matters of public interest on the principle of local self-government. More detailed rules on this are laid down in law. By the same principle, the local authorities are also responsible for other matters laid down in law.' The Article says little, however, about how claims are to be assessed, or which services are to be provided. This determination is left to the local or regional authority in question. Where formalities are concerned, the Administrative Procedure Act (SFS 2017:900) and the Local Government Act set out in considerable detail how decisions are to be taken, and by whom. The Health and Medical Services Act, moreover, assigns major responsibility for health care to the regional authorities, and specifies the decisions which said authorities may take in this field. The Act also sets out how claims are to be assessed. It does so, however, in a manner which is often quite vague, leaving considerable room for discretionary decisions by the regional authorities. In Chapter 3, Article 1, for example, it states simply that the objective of policy in this area is 'good health for the whole population'.

The Social Services Act also sets out general objectives. It states, for example, that decisions on eligibility for assistance are to be based on whether the persons in question are 'unable to provide for their needs', and on whether they are 'at the disposal of the labour market'. The amount of assistance granted should be such that, '[t]hrough the assistance, the individual shall be assured of a reasonable standard of living'. Furthermore, '[t]he assistance shall be designed in such a way as to strengthen his or her resources for independent living'.

The Health and Medical Services Act and the Social Services Act set out many of the objectives which local and regional authorities are charged with fulfilling. The latter in turn enjoy substantial leeway in how they do this. What does this mean for the rights of individuals? To ensure fairly uniform results and avoid undue geographical variation, individuals may appeal to a court for a review of decisions made in areas like social assistance. In such areas as health care, however, individuals cannot appeal to a court regarding decisions made. Instead, these decisions are subject to monitoring by a national supervisory body.

3.4.4 Local authorities and third-party service delivery

In 2008, Parliament passed the Act on System of Choice in the Public Sector (SFS 2008:962). This Act gives individuals the right to choose between different suppliers of publicly procured services. The substance of the Act is mainly devoted to setting out how public authorities are to treat potential and contracted service providers. The practical effect of the Act has been to open the door to a wide range of service providers in a number of social-security fields – fields where the public authorities had previously enjoyed a monopoly. In other words, a market for welfare services has emerged. An example of this can be seen in the growth of private provision in the area of elder care, where the municipalities nowadays are just one of many providers in many cases. Child and youth care is another area marked by the trend towards privatisation and marketization.

The market for private care providers is relatively free, even in the area of health care. Moreover, since EU citizens enjoy freedom of movement in the health-care sector, there are several key EU directives that facilitate the free movement of eHealth services. These directives, together with flexible Swedish regulations which have facilitated entry into the health-care sector, have enabled private health-care providers to shape much of the current eHealth landscape. The private health-care sector was very small in Sweden traditionally, but it has grown considerably over the last two decades. The emergence of eHealth has added greatly to this growth, as many services in that area are provided by the private sector. There are both advantages and drawbacks to this trend. One advantage, of course, is the greater breadth of the market, with the improved opportunities it affords to obtain customised health care. However, this increased diversity – of health-care provid-

ers, products, and services – gives rise to problems in connection with quality assurance on a national basis. The health-care system risks failing to achieve the primary goal laid down by the central government for the country as a whole: namely, good health and the provision of care on equal terms to all, as stated in the Health and Medical Services Act, Chapter 3, Article 1.

One key feature of the trend towards privatisation in Sweden must be borne in mind: the system is still publicly funded. Individuals can choose amongst the available providers, but the public sector remains responsible for the financing. This trend towards publicly funded freedom of choice has been the subject of political debate, amongst other things in relation to the profits made by private companies engaged in providing welfare services. It has been suggested that Parliament should pass legislation limiting profits, in order to ensure that tax money does not 'end up in the pockets of private companies'. A government-appointed commission did issue a report on the possibility of limiting the profit margins of such companies; however, under the terms of an agreement between four of the parties represented in Parliament (the 'January Agreement'), the current government may not act on this report or pursue the matter further during the current term (i.e., until the next election, scheduled for 2022).

3.4.5 Supervision

The central government advises and supervises local and regional authorities, through agencies like the county administrative boards, the National Agency for Education, and the National Board of Health and Welfare. Such supervision may involve both auditing and support. These agencies cannot invalidate decisions made by local or regional authorities, but they can institute court proceedings in some cases, or impose fines on the authority in question. They can also address offenses or other problems by informing the central government of shortcomings.

In a limited number of areas – in connection with some regional issues regarding food, fire safety, and the environment – the central government has delegated supervisory responsibilities to local and regional authorities. Furthermore, auditors are appointed by the general assembly of each local and regional authority. These auditors review committees, boards, municipalities, and county councils on an annual basis. In addition, residents have the opportunity to appeal decisions made by such authorities in court. The court may then overturn the decision, wholly or in part, but it cannot replace it with a new decision. In the case of decisions regarding an individual – on an application for social security, a request for a building permit, or the like – the individual concerned can appeal the decision. Appeals of this kind are known as administrative disputes, and in such cases a court can replace the contested decision with a new one.

3.4.6 Financing

Under the terms of the Local Government Act, local and regional authorities may charge fees for the services they provide. However, they may do so only for business conducted on the basis of their general competence, as described above. In the case of services that these authorities are obligated to provide, fees may be charged only if this is explicitly prescribed. Nor may these authorities charge fees in excess of those needed to cover their costs for providing the service. This is known as 'the self-cost principle' (*självkostnadsprincipen*). Fees charged in excess thereof must be credited to the company or individual who paid the fee and kept separate from other resources.

As mentioned above, a large portion of social security is furnished by trade unions, to their members. The state provides a minimum level of security, but this is topped up in several areas – ranging from sick days to parental leave – by benefits derived from union membership or collective agreements. This not insignificant area of social security is financed by union membership fees. It also bears noting that some employers not bound by a collective agreement provide corresponding top-ups to their employees on a voluntary basis, as such top-ups have become market practice on the Swedish labour market to some extent.

3.4.7 Client involvement

As mentioned earlier, an individual is a member of a municipality if he/she is registered there, owns property there, or is taxable there. Moreover, an individual is a member of a regional authority if he/she is a member of a municipality within that regional authority. Membership is important not only for a person's obligations, such as payment of taxes, but also for his/her individual rights, such as the right to influence an authority's policies and decisions.

There are several ways to influence policy and decision-making in a local or regional authority. Direct involvement in the assembly is one. To be eligible to stand for election in such an assembly, an individual must amongst other things have the right to vote in elections to that assembly. Otherwise put, voters and candidates must come from the same group. To have the right to vote for such an assembly, an individual must be registered in the authority in question. Members of the assembly can propose motions and ask questions. Those who are members of a committee can raise matters. Assembly meetings are usually public. The assembly may decide, however, that certain questions require deliberation behind closed doors. Such secrecy is limited to the actual deliberations. The decision to 'close the doors' must be public, and decisions resulting from such deliberations must be publicly posted as well.

Furthermore, a member may demand that an administrative court assess the legitimacy of a decision made by an assembly or committee. However, such a decision can only be revoked if formal deficiencies in the decision-making process come to light. It is not enough that the decision be substantively 'bad'. Furthermore, when a fault in the process has no impact on the outcome, the decision need not be revoked.

3.4.8 Paradoxes of decentralisation?

The trend towards decentralisation is marked by several paradoxes. Seller and Lidström, and Holosko et al, note the paradox whereby the leeway for local action has expanded significantly, even as both legal frameworks and financial concerns have limited opportunities to make use of this leeway.[4] Thus, while local and regional authorities have generally acquired greater formal powers, they may not possess the resources to reach the goals set out in national regulation or in local policy.

Increased local powers have also come to mean more duties to report to the central government. In many policy areas during recent decades, supervision of local and regional authorities by the central government has clearly increased.

In addition, increased responsibilities in several areas, combined with regulatory requirements imposed (with or without financing) by the central government, can create difficult boundary issues for local and regional authorities. On occasion, these even have to be resolved in court. This can lead to questions about how decentralisation impacts effectiveness, as well as due process and the rule of law.

The relationship between the central government on the one hand, and local and regional authorities on the other, is often tricky when the former attempts to direct the latter by various means, such as through financial incentives. There is a trend, for example, towards an increased use of time-limited projects. This is often seen in the area of regional policy, where co-financing between different levels of government is often necessary. To be successful, then, decentralisation must be based on effective cooperation between the central government and local and regional authorities. This may be complex and hard to organise, but the collaboration and shared financing it affords can also make for clear advantages.

4. Sellers, Jeffery and Lidström, Anders (2007) 'Decentralization, Local Government, and the Welfare State', *International Journal of Policy, Administration, and Institutions*, Vol. 20, No. 4, October 2007, p. 619; and Holosko et al., 'Social Services in Sweden: An Overview of Policy Issues, Devolution, and Collaboration' in *Social Work in Public Health,* 24:210-234, 2009, p. 227.

4 State of the debate and future prospects

4.1 Arguments in favour of devolution and decentralisation

Devolution and decentralisation can enhance local autonomy. They may also promote innovative thinking about how to address social needs in areas where special conditions prevail. Furthermore, a more direct link between residents on the one hand, and organs of political or other power on the other, may result in greater direct participation in the democratic process. In some rural areas of Sweden, for example, municipalities have deemed it necessary – for the sake of efficiency and budgetary balance – to close down small schools. As a result, pupils have had to commute to more distant schools. Individuals in some of these communities have therefore opened private schools instead, which have managed to stay open despite apparently operating under the same conditions as the previous schools under municipal management. In this context, it might be noted that an amendment to the Health and Medical Services Act came into force in 2019. According to the new wording, in Chapter 7, Article 2 a, county councils shall organise health and medical services in such a way as to ensure that care is provided close to the population. If considerations of quality or efficiency so dictate, however, health care may be concentrated geographically. This illustrates the dilemma that many local and regional authorities face: Should services be offered locally, even if the financial cost be greater? Or should they concentrated for the sake of efficiency?

4.2 Arguments against devolution and decentralisation

According to Holosko et al., one major reason for the trend towards devolution in social security is lack of funds. The authors claim that, when central governments are unable for various reasons to fund welfare programmes themselves, they transfer the burden to local governments. This is not problematic in itself. From a policy perspective, however, it can be problematic if the trend towards devolution is depicted as a response to a need for greater local autonomy, rather than as a solution – and it may not even be that – to an economic problem.[5]

What then is problematic, as Holosko et al. see it, is when local authorities are required – on the basis of limited resources – to furnish social security and to provide for other needs.[6] As mentioned earlier, this problem has been addressed to some extent in Sweden by means of the 'Robin Hood tax', which transfers resources from wealthier areas to less fortunate ones. This may solve the immediate problem of lack of funding for poorer areas, but such transfers are not uncontroversial.

5. Holosko et al. (2009), p. 227.
6. Ibid.

One might question the burden they place on better-off communities, and media commentators often do. Current arrangements in this regard may not be politically sustainable.

4.3 Plans, visions, and dreams

During the last decades of the 20th century, several profound changes took place in society which have decisively affected conditions for the exercise of public responsibilities by local and regional authorities. EU membership, economic globalisation, and the digital revolution are some examples. Ongoing changes in the age structure of the population, and the many consequences flowing from these, have also had a major impact on the conditions under which local and regional authorities must operate. Furthermore, the ability of such authorities to cope with their care responsibilities is affected by such matters as the geographical distribution of talent across the country. As a general matter, large discrepancies exist in this regard between inhabitants of the countryside and their counterparts in the big cities. One central question in this context is how the rapid changes taking place in society challenge the relationship between the central government and local and regional authorities. The responsibilities borne by the latter are highly diverse, and intertwined with one another besides. These bodies must discharge core obligations demanding a high level of service, even while promoting regional development, engaging in international cooperation, and collaborating with private and other actors.

This raises questions about the basic competences granted to local and regional authorities. For example, national legislation has not yet caught up with the rapid developments in eHealth taking place with these authorities as well as private actors in Sweden. As a result, responsibility at the national level has become less clear. One concern is that rapid technological developments in this sector may induce local and regional authorities to try to resolve new problems on their own. It may be difficult, namely, to devise appropriate national rules for a sector undergoing such rapid change.

In section 3 above, we distinguished between economic support on the one hand, and the provision of care on the other. Transferring responsibility for the latter to private providers may be a reasonable option. However, transferring responsibility for assessing claims and making payments in the former area would seem to be more complicated. According to classic Swedish precepts on social welfare, namely, tasks of that kind fall squarely within the remit of the public authorities. In future, therefore, we may see a clearer division between the provision of care and the allocation of benefits, with the distinction being based on who carries out the task. Thus, the public authorities may transfer the actual provision of care to other

actors, while retaining for themselves the power to decide who merits economic support, and under what conditions. The resulting picture is a complex one, wherein competences in the area of social security in Sweden will be divided between the central government, regional authorities, local authorities, and various private actors.

Devolution and decentralisation in social security: the situation in Switzerland

Thomas Gächter and Thuy Xuan Truong

1 A general picture of the system of social security and the administrative organisation

A look at the history of Swiss social security schemes shows a number of striking constants that have left their mark on and continue to shape the socio-political discourse (Gächter and Tremp 2014, 32-33(25-26)):

- Federalism (particularly regarding the implementation of processes and controversial political issues, e.g. the extent to which contributions can be reduced in the compulsory health insurance scheme).
- (Semi-)direct democracy (popular initiatives: the opportunity to focus attention on pressing socio-political issues; and legislative referendums: the requirement that proposals be carefully formulated and balanced so that they can overcome the hurdles of legislative referendums).
- Liberalism and the (relatively) liberal stance of all Swiss political parties (aversion to compulsory insurance; aversion to centralised state solutions).

Of all these factors, it is the Swiss semi-direct democracy with its strong participation rights that has had the most profound impact on developments in comparison with other countries around the world. It is noteworthy that countries in which the population has a direct say in decisions on expanding or restructuring social welfare institutions (i.e. through referendums or popular initiatives) are characterised by more modest social security systems. In Switzerland, the majority has regularly voted down proposals for a comprehensive expansion of the social security system. The same constants shape Swiss social security law, which is conceptualised as a mixed system between Beveridge and Bismarck. Old-age and survivors' insurance, disability insurance and healthcare (as well as family allowances to some extent) include the entire population, whereas most other schemes are sectorial insurances that, in most instances, cover employees only. The cantonal social assistance, in turn, covers the entire population in principle and thus follows the Beveridge approach.

The implementation processes, including those pertaining to social security, are typical of Switzerland's federalism. As a principle, federal law is implemented and executed by the cantons. In social security, cantonal and regional agencies are responsible for almost all schemes, while the supervision of this execution lies with the federal departments.

2 The state of devolution

2.1 Historical remarks

Previously a confederation, Switzerland became a federal state with the commencement of the federal constitution in 1848. Since the additional creation of the canton of Jura in 1979, the country has been made up of twenty-six cantons.
The competences of the federation were limited to a few tasks even after the formation of the federal state. Law-making competences largely remained with the cantons. As historically evolved polities, they continue to have pronounced autonomy in terms of law-making, execution and organisation. Though widely different in terms of size and population, basically all of the cantons enjoy equal rights.
The development of the social security system in Switzerland is depicted further below as part of the historical remarks regarding the state of decentralisation,[1] which includes an account of the different development phases, and thus the development of the division of competences.

2.2 Constitutional setting

Social objectives are defined in article 41 of the Federal Constitution (*Bundesverfassung, BV*). They call for efforts on part of the federation and the cantons to ensure that every person has access to social security and to the healthcare that they require. Every person should have protection against economic consequences in the cases of old-age, disability, illness, accident, unemployment, maternity, being orphaned and being widowed. While these social objectives do not grant individuals direct rights on their own, they are still understood as being instructions to the federation and the cantons to work towards those goals to the best of their abilities, and to take them into consideration when applying laws (Kaufmann 2015, (10-12)).
In contrast, the right to assistance in need named in article 12 of the BV is a fundamental right, but limited to emergency support. Legislative mandates concerning social security are listed in article 59, paragraphs 4 and 5; article 61, paragraphs 4 and 5; and article 111-117 of the BV, separated by the various schemes of social security, including the cantonally regulated area of social assistance in article 115 of the BV. This assignment of competences and tasks is followed by a list of direc-

1. Refer to 3.1.

tives to take into consideration in the legislation process. Some of these directives are highly specific, notably in the case of old-age, survivors' and disability insurance.

2.3 The division of competences between the layers of government

2.3.1 State structure (i.e. federal, confederal, unitary)

In Swiss federalism, governmental actions and laws are distributed across three levels: federal, cantonal, and communal. The twenty-six cantons retain a comparatively large degree of autonomy even after the formation of the federation, limited only by the federal constitution. The autonomy of communes is determined by the cantons they are part of.

In the federal constitution, all competences assigned to the federation are enumerated. This enumeration is conclusive (Haller 2016, 66(132)). All remaining competences are the cantons' to exercise. In line with the principle of subsidiarity, the federation only takes on competences that either exceed the capacity of the cantons or that require uniform regulation by the federation itself (Haller 2016, 65(129)). Subsidiarity also means the reserved exercise of said competences in respect of the autonomy of the cantons. The federation leaves them a sufficient amount of tasks, takes their organisational autonomy into consideration, and contributes to the financial resources required for those tasks. The same holds true where cantons implement federal law, as they are given ample room in organising their own affairs. Where the federation has exercised its constitutional law-making competences, federal law takes precedence over any conflicting cantonal law.[2]

The relationship between federation and cantons is one of cooperation, where mutual support and respect is owed. Cantons are able to take part in federal decision-making. Where their interests are affected, the federation is also to inform and to consult them.

It has to be noted that changes to the federal constitution have steadily reduced cantonal competences over the years, as more and more competences are assigned to the federation as part of efforts to centralise regulations. Even so, Switzerland's federalist elements still remain strong compared to those of other federal states (Jaag 2015, 143-144(21)).

2.3.2 Division of competences in social security

The Swiss division of competences in social security can generally be characterised as follows: The social security schemes are largely completely regulated at federal level. The cantons, however, have substantial competences particularly in the residual areas that are means-tested. They are namely responsible for the organisation and regulation of social assistance (article 115, BV). They further have selective

2. Cf. Haller 2016, 82-83(162).

competences in various social security schemes based on the delineated delegations by the federal legislation, specifically regarding contribution reductions in health insurance, the law of family allowances, and the supplementary benefits system. The benefits in these areas are also means-tested, which allows the cantons to reconcile their cantonal social policy with the federal guidelines to some extent. In other words, the federal guidelines can be adequately implemented in the cantonal social security system.
Beyond that, the cantons play an important role in the establishment of hospital infrastructure and the financing thereof. It is in this indirect way that they exercise substantial influence over the performance level of health insurance, as the local availability of hospital services has an effect on the medical provision financed by the health insurance.
Alongside measures taken by the federation, the cantons take part in promoting the rehabilitation of people eligible for disability benefits. They also provide assistance and care for the elderly as well as people with disabilities in their home.
As is typical of Swiss federalism, the responsibility to execute federal social security law lies with the cantons, though they have comparatively less autonomous room in this field. The only scheme in social security law that used to be executed by the federal administration itself was military insurance. From 2005 onwards, the Swiss Accident Insurance Fund (*Schweizerische Unfallversicherungsanstalt, Suva*) has been assigned to this task.

2.3.3 Local responsibility or solidarity between local states/regions

In the Swiss system, it is necessary to differentiate to what extent the cantons and the communes, and to what extent the federation is responsible for the financing of a social system, and how solidarity between the respective cantons works.
In matters of cantonal responsibility, especially when it comes to social assistance, both content- and finance-related regulations are organised at cantonal level. The federation neither contributes to the funding of social assistance nor does it set minimum standards. The constitution solely stipulates a constitutional right to assistance when in need (article 12, BV), which compels the locally responsible polity to provide survival assistance in emergencies. The cantonal legislations regarding social assistance, however, greatly exceed this constitutional minimum, in no small part due to the directives of the Swiss Conference on Social Welfare (*Schweizerische Konferenz für Sozialhilfe, SKOS*). These directives, while recommendations without legal force, play a crucial role in the harmonisation of social welfare law and have been largely adopted by the cantons. The federally organised schemes of social security paint a drastically different picture. While the cantons and communes in these schemes are local reference points in terms of organisation, they are not financially self-contained and independent entities. This basically means that there is solidarity between all the affiliated insured individuals within the nation-

ally organised insurance schemes, though that solidarity can be broken by the wide variety and the large amount of insurance providers.

More specifically, solidarity takes shape as follows:

- In the old-age and survivors' insurance scheme, administration is in principle handled by the local compensation agencies (*Ausgleichskassen*). Financially though, all revenues and expenditures throughout Switzerland make up one bill.
- The same system applies to the compensation scheme for lost income (*Erwerbsersatzordnung*), which provides monetary benefits in the cases of performed services (e.g. military service) and maternity. Its execution is also handled locally by the compensation agencies, while the entire system makes up one national bill.
- The unemployment insurance scheme, too, is based on one uniform bill for the entirety of Switzerland. This comes as a surprise, considering that there are economic differences between the various regions of Switzerland, with the unemployment rate – and thus the cost of unemployment insurance – varying from region to region. Nevertheless, the same contribution rate and basically the same level of benefits apply to all of Switzerland, which means full solidarity between all insured individuals and regions.
- The accident insurance scheme is federally regulated, and exclusively funded through contributions paid by the employer (occupational accident insurance) and the employee (non-occupational accident insurance). There is solidarity within the individual insurances, meaning that the respective insurances do not keep records by region. The contributions are instead calculated on the basis of risk. It bears mentioning that employers who are active in risk-prone fields (e.g. industry, transportation, construction) are all required to be insured with Suva. Suva thus holds a partial monopoly in the accident insurance scheme, which covers about half the employers in Switzerland. All other employers can affiliate themselves with an accident insurance provider governed by private law. These insurance providers in turn form the solidarity community for the affiliated employers, which means that there is solidarity within the same insurance provider regardless of region. There is no redistribution of funds between the insurers.
- As far as health insurers are concerned, the Health Insurance Law (*Krankenversicherungsgesetz, KVG*) primarily relies on competition. Social health insurance is provided by a body of insurers whose number is not restricted by law. They compete for the business of the insured, who can freely choose and switch between them (full freedom of trade). This promotes competition, but the state intervenes in the market as a strong regulator by barring risk-based contributions and by legally defining the list of services covered by the scheme. The requirement to pay contributions in the health insurance scheme does not depend on a person's employment status. Nor are the health insurance contri-

butions based on financial strength (i.e. on income or some other benchmark for setting contributions). The health insurers set insurance contributions, but these must be approved by the Swiss Federal Council (article 61, paragraphs 1 and 5, KVG). Insurers essentially collect the same contribution from all the insured parties (the so-called *Einheitsprämie*, or single contribution; article 61, paragraph 1, KVG). With only a few legal exceptions, insurers are not permitted to set contributions based on risk or income. The law permits the following contribution tiers:

- A tier based on the insured party's place of residence (article 61, paragraph 2, KVG): contributions may vary according to canton and region.
- A tier based on the insured party's age (article 61, paragraph 3, KVG): contributions payable by persons up to the age of 18 (children) must necessarily be cheaper than those for older people (adults). In addition, insurers are permitted to reduce contributions for people up to the age of 25 (young adults). With the exception of these regulations, age may not play a role in determining contributions.
- A tier based on the selected insurance model: lower contributions may be granted for special forms of insurance pursuant to article 62 of the KVG.

As health insurers must admit any person seeking an insurance contract with them, it is possible for an insurer to accumulate insured individuals who are considered bad risks, e.g. people who are chronically ill or people who have high health risks. In order to equalise those differences (at least in part), a system of risk compensation between the various health insurers is in place (Eugster 2007, 766(1077)). This risk compensation establishes some solidarity between the insurers.

– The local anchoring is of no importance to the occupational pension system (*Berufliche Vorsorge*). Over 2000 pension funds (*Pensionskassen*) offer this mandatory insurance, each of them forming a solidarity community of their own. There are no transfer payments and no solidarity between the funds.
– The regional anchoring only plays a minor role in the system of family allowances (*Familienzulagen*) as well. The solidarity communities are essentially comprised of the employers affiliated with the various funds. The cantons, however, are permitted to arrange for solidarity payments between the various funds that are active within their territory.
– The supplementary benefits are a special case: They are based on federal minimum standards that may be expanded on by the cantons. Under article 13, paragraph 1, of the Supplementary Benefits Law (*Bundesgesetz über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung, ELG*), the federal government provides five-eighths of the funding for the annual supplementary benefits, while the cantons provide three-eighths. Contributions by the federal government are financed through general funds if they cannot be

taken from the reserves described in article 111 of the Old-age and Survivors' Insurance Law (*Bundesgesetz über die Alters- und Hinterlassenenversicherung, AHVG*; article 13, paragraph 3, ELG).
– The cantonally organised social assistance, on the other hand, is entirely tax-financed. The extent to which the communes are involved in the financing varies from canton to canton. In some cantons, virtual solidarity exists within the entire canton as the cantons themselves are responsible for the financing. In others, it is the communes that are primarily in charge of the financing, leading to some communes being more heavily burdened than others.

3 The state of decentralisation

3.1 Historical remarks

The history of Swiss social security is also the history of its centralisation and decentralisation. As previously mentioned,[3] that history can likewise be read as the development of the division of competences in the federal state.

3.1.1 First phase (around 1900)

The Swiss federal government was assigned a constitutional mandate in 1890 to establish health and accident insurance. The idea was to follow in the steps of Bismarck, who had built a relatively self-contained system of social security laws specifically for the workers of the German Empire not too many years before. However, the well-coordinated system of the proposed Lex Forrer, which was comprised of health, accident and military insurance, decidedly failed in the popular vote of 1900. This failure is largely attributed to the resistance of employers as well as the working force, who feared losing the insurance they had been granted by the unions, as the Lex Forrer envisioned for the new health and accident insurance to be (Locher and Gächter 2014, 34(7)).

In the aftermath, the Military Insurance Law (*Militärversicherungsgesetz, MVG*), and the Health and Accident Insurance Law (*Kranken- und Unfallversicherungsgesetz, KUVG*) were introduced in 1901 and 1911 respectively. Although the latter formed one law, the regulations of the two schemes drastically differed: the health insurance scheme saw the existing health insurance funds as the continued and sole providers of coverage, with insurance still not being mandatory, whereas the accident insurance scheme gave monopoly to the Suva Luzern, with insurance only being mandatory for certain groups of workers.

The demonstrated resistance of groups with an interest in preserving existing insurance structures would have long-term consequences from then onwards, dooming plans for a comprehensive approach to expansions of the social security

3. Refer to 2.1.

system. Instead, existing private insurance entities would be given stronger consideration (Gächter and Tremp 2014, 31(19)). At the same time, the aversion to centralised solutions became apparent, which is why the regional decentralisation of execution and the consideration of cantonal structures have been essential components of the Swiss execution organisation ever since.

3.1.2 Second phase (after the Second World War)

Following the Second World War, social security law saw a swift expansion owing to the economic upswing (Meyer 2007, 34(18)). In line with England's Beveridge Plan of 1942, which was conceived as a fallback system for the entire English population, the old-age and survivors' insurance scheme was established in 1942. This scheme would protect Switzerland's entire resident and working population against the consequences of aging or death of family providers.

Afterwards, several branches of social security were added and considerably expanded in terms of coverage (the unemployment insurance scheme in 1951; family allowances for the agricultural sector and the compensation scheme for lost income in 1952; the disability insurance scheme in 1959), and social insurance agreements were made with more than thirty states in response to the increasing migration of working populations.

3.1.3 Third phase (around 2000)

New social and legal developments (e.g. gender equality, changes in family structure, etc.) led to the adaptation of individual social security laws (Gächter and Tremp 2014, 31(21)). As a result of giving up on a comprehensive approach to social insurance, Swiss social security law had turned into a two-track structure marked by gaps and incoherence, which made the coordination of the fragmented legislation more and more important (Kieser 2007, 238(5)).

After over fifteen years of being in development, the Federal Law on the General Section of Social Insurance Law (*Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts, ATSG*) finally entered into effect in 2003. For the individual laws that declare the ATSG to be applicable, it uniformly defines central terms and institutes, harmonizes procedures, and coordinated benefits for the branches of social insurance.

One of the most important legislative changes in the last twenty-five years was the transformation of health insurance into a compulsory scheme in 1996, which grants a high level of benefits to the entire population. Further notable additions are the introduction of maternity insurance in 2005, and the Federal Law on Family Allowances (*Bundesgesetz über die Familienzulagen, FamZG*) in 2009.

3.1.4 General Trends

When reviewing the development of Swiss social legislation with regard to decentralisation, the following becomes apparent: its development history is one of

increasingly centralised regulations at the federal level. Over the decades, more and more federal insurance systems have been created.
At the same time, the execution of those laws regularly remains in the hands of decentralised units, i.e. private or public bodies below the federal level. Legislation and execution of legislation are thus – even just on the grounds of Switzerland's federalist structure – located at different levels. In contrast, social assistance has always been a regulatory responsibility of the cantons. The federation only regulates the coordination between the various systems. Accordingly, the execution structures, too, are cantonally regulated and differ considerably from each other in some cases. An actual centralisation of executive tasks in the hands of the federation never took place, which is why no actual decentralisation ever followed.

3.2 Constitutional setting

It was not until the reform of the NFA[4] that Switzerland explicitly anchored the principle of subsidiarity in its constitution (article 5a, BV). Still, it is mostly of a programmatic nature, and primarily reflects what had always been handled that way out of consideration for the Swiss constitutional structure and the strong involvement of private bodies in the execution of federal law: the centralisation of government tasks is eschewed insofar as they can be carried out by private or public bodies.
Article 178, paragraph 3, of the BV calls for a formal legal basis whenever an administrative task is to be assigned to a public or private body outside of the federal administration. The various social insurance laws are laws in a formal sense. They each clearly define the private or public organisations in charge of administering the law, which is to say that the social insurance laws meet the constitutional requirement that the delegation of tasks is only possible based on a legal basis. This principle ultimately serves the democratic legitimation of administrative actions, as such functions are entrusted to all the respective organisations on the basis of a democratically legitimated law, which – as a Swiss particularity – was subject to an optional referendum.
The constitution contains no further statements regarding the matter of decentralisation.

3.3 Functional decentralisation versus territorial decentralisation

3.3.1 In general

The strongly decentralised implementation process, distributed across various insurance providers and administrative units, has historically been attributed to the peculiarities of Swiss social security law and is one of its prominent features.

4. Refer to 2.1.

This extensive decentralisation is, on the one hand, a result of the highly developed Swiss form of federalism, which, at a minimum, leaves the execution of federal laws to the cantons. In contrast to other areas, the cantons are given little freedom to actually shape federal social insurance law. On the other hand, there has always been a strong preference in Swiss social insurance law to tap into already existing private structures in order to execute social insurance schemes (Meyer 2007, 64(97)). Stable structures with their own solutions had already existed by the time the respective social security laws were created, notably in the occupational pension system, in the old-age and survivors' insurance scheme (the trade association compensation agencies in particular), and in the health insurance scheme. Involving private legal entities in the governmental responsibility of social security is the product of a strongly perceptible political preference.
Furthermore, the decentralised implementation process has resulted in the necessity to supervise the various administrative units, which in turn must be carried out by additional, higher-level federal offices.
On the other hand, the execution of the cantonally regulated social assistance has always been highly decentralised locally, i.e. the cantonally regulated social assistance is still predominantly executed by the communes today.

3.3.2 Large spectrum of decentralised bodies in social insurance schemes

Each insurance scheme has its own administrative bodies with their own functions and regional jurisdictions. These bodies come in a wide variety, from public to private, from independent to dependent institutions, and in many different organisational structures. A good amount of schemes are primarily in the hands of public institutions (the compensation agencies in particular), but important schemes of the compulsory social insurance system have been assigned to private institutions (namely in unemployment insurance, accident insurance, health insurance and the occupational pension system). Some of these private institutions are fully responsible for a scheme, whereas others hold a parallel responsibility alongside a public institution.

3.4 The powers of the local decentralised level

Two factors should be taken into consideration when assessing the competences and leeway of the decentralised units:
On the one hand, legislation competences in the area of social security are, according to the described division of competences, largely located at the federal level, especially as far as social insurances are concerned. In other words, the federation determines the requirements and scope of benefits. Only in a few cases (such as contribution reductions in health insurance, family allowances, or supplementary benefits) do some regulation competences remain with the cantons. In matters

regulated by the federation, it is the federal government that usually exhaustively determines how benefits are assessed and fleshed out.
On the other hand, as has already been demonstrated, it is particularly systems that provide benefits based on a means test (i.e. benefits that are individualised and assessed on a case-by-case basis due to their nature) that are almost exclusively regulated by cantonal law.
In matters such as social assistance, the cantons may autonomously set the scope and type of benefits, and may also grant the communes the respective powers.

3.4.1 Policy, determining the claims and delivery of services

The benefits of social insurances are usually exhaustively defined in the federal norms at the level of laws and ordinances. The decentralised executive organs have relatively little leeway when assessing, determining and paying out those benefits. This setup does not allow for an actual decentralised social policy within the federally organised systems.
Some leeway exists only in unemployment insurance with regard to rehabilitation services. Although the scheme is federally regulated, measures to combat unemployment as well as employment and educational measures are organised by the cantons, meaning that the cantonal offers vary. In principle, meeting the eligibility criteria means having a claim to those benefits, even if their substance may vary from canton to canton.
In the cantonally organised systems, especially in social assistance, there is a relatively big scope of action: for one thing, the cantons are free to choose how to ensure that welfare benefits are guaranteed. It bears mentioning that a substantial part of cantonal social policy is conducted within the context of social assistance legislation. Moreover, the implementation of social assistance is geared towards individual cases by nature, as a means test has to be performed in each case, and individual needs of those affected have to be covered. This is usually carried out by communal authorities, which have a decisive amount of leeway within the context of cantonal or even communal social assistance legislation.

3.4.2 Local authorities and third party service delivery

Organisations and services that are not part of the administration are deployed in all kinds of functions in the Swiss system of social security. As described, the entire implementation system is characterised by functional differentiation across differently organised insurance providers. In this sense, it is not surprising that the decentralised administration units themselves employ third parties to render services.
In the most socio-politically significant domain of health insurance, virtually all services are performed by third parties (hospitals, doctors, miscellaneous providers). In accordance with federal law, these parties are compensated with comparable rates that may vary from place to place.

In the matter of integrating welfare recipients and the unemployed, it is particularly common for local authorities to cooperate with external service providers that offer integration services to authorities on a contractual basis. These external service providers can be non-profit organisations or profit-oriented companies that offer the desired service. The authorities are relatively free in their choice of contract partners, but are under an obligation to award contracts in accordance with the applicable procurement law.

3.4.3 Supervision

Just as there is a large number and diversity of implementation bodies, so there are multiple supervisory authorities among the federal government and the cantons. They ensure that social security law across the different schemes is properly and consistently applied, that its application is equal, and that justice is neither denied nor delayed in matters concerning the insured.

As a preventive measure, they may issue general directives with regard to the implementation of the law. In various schemes, insurance providers are also required by law to submit their regulations or statutes to the supervisory body for approval. In the case of law violations, supervisory bodies may take repressive measures such as imposing conditions, issuing warnings, and giving instructions to settle individual cases. In addition, insured individuals may lodge a complaint with the respective body.

The ultimate supervision over the federally regulated schemes of social security essentially lies with the Federal Council, which is responsible for all social insurance schemes and regularly reports to parliament (article 76, ATSG; article 64 of the Occupational Pension Law [*Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge, BVG]),* although it has delegated this authority to the Federal Department of Home Affairs. The Federal Regulatory Commission (*Oberaufsichtskommission, OAK*) was introduced as part of the structural reform of the BVG (article 64 ff., BVG; article 5 ff. of the Occupational Pension Supervision Ordinance [*Verordnung über die Aufsicht in der beruflichen Vorsorge, BVV 1*]). Administratively and financially independent from the Federal Council, the commission supervises the cantonal supervisory bodies and the occupational pension scheme.

Cantonally regulated matters (e.g. social assistance) on the other hand are not supervised by the federation, but by the respective cantonal organs.

3.4.4 Financing

As far as local authorities are entrusted with the execution of federal law, they are not separately compensated for it, meaning that they see to implementation tasks at the expense of their own budget.

However, special measures regarding work integration, namely as part of unemployment insurance, are compensated to the local implementation offices at the expense of the central unemployment insurance compensation fund (article 92,

paragraph 7, of the Unemployment Insurance Law [*Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung, AVIG*]). To a certain extent, the cantons contribute to the expenses that the unemployment insurance incurs through employment services and labour market measures (article 92, paragraph 7bis, AVIG).
Likewise, the cost of other federally regulated integration measures, especially in the area of disability insurance, are accounted for at the expense of the insurance.
The costs of the cantonally regulated social systems, especially of social assistance, are carried by the cantons and communes. The cantonal regulations vary greatly in this regard.

3.4.5 Client involvement

The Swiss social insurance system does not provide special measures to improve client involvement. Although the executive organs of social insurance law are to consult the insured persons individually, and to refer them to the correct authorities if needed, there are no special measures in place to improve cooperation between executive organs and clients.
Still, the regular exchange between authorities and clients has special meaning within systems geared towards integration (unemployment insurance, disability insurance, and social assistance). Though in part prescribed by law, this exchange is handled very differently in the various cantons, especially in the area of social assistance.

3.4.6 Decentralisation paradox?

In most of Switzerland's social systems, implementation was decentrally organised to begin with, so no decentralisation steps had to be taken. In this respect, the classic decentralisation paradox has hardly occurred. The structures were and still are of small-scale design.
For the systems of federal law, these structures are based on the concept that normative guidelines are issued at a federal level, whereas the execution – with relatively minor leeway content-wise – rests in the hands of decentralised administrative units, i.e. the insurance providers.
As the implementation standards were the federation's to define and also to supervise from the start, no major shifts have occurred within these structures.

4 The state of the debate and future perspectives

The defining trait of the Swiss social security system is its immensely decentrally organised implementation structure. Reasons for this strong decentralisation lie, for one, in the relatively small-scale structures of Swiss federalism, which divides a territory of only around eight million inhabitants into twenty-six cantons of differing size, whose structure in turn is reflected in the implementation structures of the

social systems. Furthermore, social assistance is regulated on a cantonal and thus highly decentralised basis. In all of the cantons, it is also decentrally executed by one of the more than 2200 communes.

For another, the pronounced inclusion of institutions outside of the administration in the execution of social security results in further (functional) decentralisation, which makes the entire system seem even more small-scale.

In that sense – and unlike in other systems – the main concern of implementation is not the devolution to subordinate polities or further decentralisation of the implementation process, but rather its streamlining and professionalisation.

In effect, Switzerland struggles with the inverse phenomena of implementation structures being rather too small-scale. So far, there have only been scattered trends of concentrating executive tasks more strongly on individual bodies or on multiple regions combined. One of the few examples for this is the reorganisation of the supervision over the pension funds in the occupational pension system. In most cases nowadays, supervision in this area is carried out collectively by multiple cantons, as more professionalism and thus more security is achieved that way.

The partly fragmented implementation of social security law also has negative effects on those concerned. Particularly people who are difficult to integrate into the labour market are shuffled back and forth, for example between the cantonally organised social assistance and the federally organised systems of unemployment insurance and disability insurance. The legislator sees the solution for this problem in the so-called 'Interinstitutional Cooperation'. This way, existing implementation structures and authorities remain as they are, whereas their closer cooperation is facilitated through the simplified data exchange between authorities. This is supposed to increase the chances of a successful integration in particular.

The last thing to be wished for the Swiss system is an even stronger decentralisation of the implementation process. On the contrary, it is the concentration of executive tasks in individual bodies that is needed, which could facilitate the citizens' access to the system, and prevent wasted efforts. Such reforms would, however, entail a substantial reconstruction of the administrative system, which in turn would come with drastic measures (e.g. downsizing). To date, the cost pressure of the system does not seem high enough to incite the institutions to change.

Devolution and decentralisation in social security: the situation in Turkey

Galip Emre Yildirim

1 A general picture of the system of social security and the administrative structure

Welfare policy in Turkey is strongly determined by the political situation. After a period of radical change in Turkey the republican regime was founded in 1923. This was followed by much economic, social and political instability. The Republican regime that was proclaimed in 1923 did not regulate the social security system directly. However, under the law of obligations in 1926 and the general public health law in 1930[1] some social mechanisms were introduced. The new regime was keen to address healthcare issues with a view to eliminating some illnesses that had appeared during the years of war (1914-1922) and thus assumed the protective role on society.

In the early years of the republic there was a multifaceted strategy with regard to social security. At a decentralised level there were some attempts to create a social system. Some professional associations tried to organise their own pension funds, for example for civil servants, military personnel and employees, but lacked the authority to do so. Until 1945 there was no centralised social security regulation. Social security became a political issue in 1945.

According to Bugra (2008), as is the case in Mexico and the other Latin American countries, social security regulation in Turkey is organised along the lines of Bismarckian corporatist social security systems. However, in 1936 a labour law introduced some basic principles by redefining the relations between employers, employees and the social institutions.

Even though Turkey did not militarily engage in the Second World War, the end of the war marked a turning point for the political system in Turkey. By 1945, Turkey adopted multiparty democracy in order to be well-placed within the European alli-

1. Of particular note, the public health policies of the new Republic by and large reflected the State protection logic of the society. According to this law, it can be seen that the state tried to institutionalise public healthcare throughout the provincial administrative system. At this point, the provincial governorship was the central authority responsible for public health.

ance system during the post-war years and the post 1945 social security system became more institutionalised through legislative action. Two legislative texts on accidents at work, occupational disease and maternity protection, and the employee insurance institution were drafted in 1945. Two organisations were also established to protect the elderly and to provide health benefits to civil servants (Emekli Sandığı – Civil Servants' Retirement Chest) and to blue-collar workers (Isci Sigortaları Kurumu – Workers' Insurance Organisation) (Bugra and Aysen 2011).

The development of Turkey's social security system was influenced by both international and domestic factors. Between 1949 and 1960, the institutionalisation of the social security system continued to evolve through further legislative actions. The 1949 elderly insurance law, the 1950 Disease and Maternity Insurance Law and the 1957 Disability, Elderly and Life insurance law are milestones marking this process. In 1949, the pension fund was legally and institutionally centralised under a single State organisation. Turkey's international engagement with intergovernmental organisations such as the World Health Organisation (WHO) contributed to institutionalising the social security system.

The period between 1961 and 1982 constitutes a completely new era for the social regime in Turkey. After a military coup, the new constitution of 1961 provided more power to the central government effectively creating a welfare state in Turkey. It could be argued that the bureaucracy was trying to rationalise the social security system through centralised legislative actions. This rationalisation process was associated with an institutionalisation act. In 1965 the Workers' Insurance Organisation became the Social Security Organization (SSK). In 1972, another social security organisation was established to cater for the other social groups in society, such as the self-employed, the peasants and the farmers. According to Eder's research on the welfare system in Turkey, '*…nearly half of the working population are still not covered by any of these insurance schemes, working entirely informally in the labor market'* (Eder 2010). As we see, bureaucratic efforts to rationalise and institutionalise the social system in Turkey were mainly affected by societal and economic factors.

Turkey's social regime has been affected by global economic conditions since 1980. In the new Constitution adopted in 1982 after the coup d'état committed in 1980, the welfare policies radically changed. The liberal economic model in Turkey became more compatible with the constitutional and legislative structure of the country which also affected the social security system (Elveren 2008). The legislatively supported neoliberal vision also created the conditions for progression towards a form of privatisation based on the idea of a new economic programme targeted at meeting industrial and commercial needs and global expectations. This privatisation initiative mostly concentrated on two public sectors, namely, education and health. Private schools, universities and hospitals started to be established with governmental authorisation. This policy of privatisation with respect to hospitals has directly influenced the country's social security system.

In 1983 a law was passed creating the Turkish social service and child protection institution, today's General Directorate of Child Services within the ministry for family and social policies. In 1986, the law 3294 introduced social aid and the solidarity promotion fund with the aim of achieving equality with regard to income distribution between different social groups.
The economic difficulties in Turkey greatly limited the government's capacity with regard to social security as it did in many other domains as well. The government did however introduce some measures to protect the social healthcare system in order provide support to individuals suffering under the economic crisis. For example, in 1993 a green card was issued to those in need to ensure them access to free healthcare services at public hospitals. The economic crises of 1994 caused an unemployment problem. In response to this, in 1999 an insurance scheme financed by the State and employers was created to provide support to the unemployed.
The Turkish economy faced financial fragility at the beginning of 2000s. Another economic crisis in 2001 culminating in a change of government forced the central bureaucracy to take structural decisions on reforming the economic and political organisation of the country. At this point, in 2001, the private insurance system was promoted as a new part of the social security system. Consequently, BAG-KUR and SSK were unified to form a new institution in 2006: the Social Security Institution. In 2008, the Social security and general health insurance law was enacted as a regulatory and legislative mechanism in this institutional centralisation of social security. Through this law the financing responsibility was accorded to the State in an attempt to universalise social security for all citizens.

2 The state of devolution

2.1 Historical remarks

The Turkish Republic, created in 1923, succeeded the Ottoman Empire that existed from the 13th to the 20th century[2]. The Ottomans created a centralised territorial system in which the sultan's authority was the centre of governance. This patriarchal structure was also based on the military and civil bureaucracy, two protected domains (Deringil 2004, 200). The Ottoman centralisation was based on the military organisation of regular army divisions. Following the fall of Constantinople in the 15th century, the social structure was decentralised and divided according to communitarian culture and religion (Ortayli 2010).

2. The Ottoman imperial structure was also a predecessor organization of the Seljuk Empire wherein the Ottomans were a peripheral military entity responsible for border security. The state structure of Seljuk Empire was highly decentralized governance system based entirely on a federal of territorial organization within a deficient central administration.

The emergence of the modern state in Europe was the biggest impediment to Ottoman expansion. The territorial losses that began in the 18th century forced the Ottoman administration to reform its bureaucracy. That is why at the onset, Ottoman modernisation concentrated on reforming the military and administrative domains. In order to have the capacity to effectively control the territories again, the administrative system was redefined and modelled on centralisation in France (Ortayli 2011). In the 19th century, a reform process called Tanzimat, translated literally as reorganisation, commenced at the military and the administrative levels of the Ottoman imperial structure. In 1854 the first municipality organisation in the modern sense was established in Istanbul. In 1864 the *Vilayet* law (Provincial law) was established to redefine the territorial governance of the Empire, in effect imitating the French system of *départements* (Tural & Çapar, 2015).
The reorganisation period that aimed at the territorial centralisation of power could be considered to mark the start of the rationalisation process for administrative *territorialisation*. This modernisation context prepared the institutionalisation phase of the Turkish State for the *constitutionalisation* of the imperial regime and, also, the foundation of the Republic based on the western values and principles adopted by the new bureaucracy. In 1876, the first Constitution was introduced by the imperial bureaucracy in response to the exigencies of the historical context. Some regulations were introduced that presaged the decentralisation of governance to the provincial administration (Özbudun 2015). The constitution further regulated religious and administrative issues in the Empire. However, problems already existed in these two domains (Korkut 2016).

2.2 Constitutional Setting

Between 1876 and 2017 Turkey changed its constitution five times and made many amendments to the texts. With the exception of the 1921 constitution,[3] all the constitutions emphasise centralisation and the power of the State. In 1924, the Republic adopted a rigid Constitution to replace that of 1921. The 1924 Constitution contained no articles guaranteeing the social rights of individuals. Populism was, however, adopted as a State ideology by the Republican People's Party (RPP or CHP) programme.
Following a military coup in 1960, the 1924 Constitution became obsolete. The next Constitution adopted in 1961 was more democratic in its structure. The Constitutional Court and the senate of the Republic were established with a view to regulating governmental abuse of power. The Turkish State also declared in the constitution that it is a *welfare* state The Article 2 defines the characteristics of the Republic: *The Turkish Republic is a nationalistic, democratic, secular and social State governed*

3. In order to mobilize the society, the parliament adopted a war plan that can be considered as bottom-up. Hence, in the 1921 Constitution had a decentralized structure in which the prefects had a decisive role.

by the rule of law, based on human rights and the fundamental tenets set forth in the preamble. So Turkey officially became a welfare social State, a policy that was continued to be pursued at local level in 1970s.
The social movement, syndicalism and polarisation of the political groups created a chaotic situation. The violence and failure of governance at that time created a situation that can only be described as politically instable and ungovernable. With a view to tackling this situation the military regime drafted a new Constitution based on conservative neoliberal ideas. The welfare State principle is protected by the new Constitution of 1982. However, providing health services was no longer one of the fundamental duties of the State. The Constitution regulates the social security rights and establishes that everyone has the right to social security.

2.3 The division of competence between the layers of government

2.3.1 The State structure

The Turkish Republic has been a highly centralised unitary State since its birth in 1923. The bureaucracy has always been centralised in order to resolve the territorial integration problem caused by its imperial structure. This centralisation policy was later adopted by the republican bureaucracy, being imposed on the new institutions that had adopted Kemalism as an ideology. Paradoxically, it would be difficult to contend that Turkey has a strong central government. In political science literature, there are many debates on how a State should be qualified as strong or weak. This type of argument depends on the political organisation of the country in question (King and Lieberman 2011). Turkey has a strong bureaucratic tradition that is organised under a unitary framework and in a more centralised manner (Heper 1985b).
The territorial administration of Turkey is divided into provinces, municipalities, villages and other public institutions. The relation between the central government and the municipalities is not based on symmetric administrative independence, but always on the superiority of the State (art. 127 of the Constitution). There are various reasons for this, including the traditionally strong role of the state in Turkey and the emotions this arouses amongst the people who refer to the state as 'father'. Consequently, the government is able to continue to deal with political issues centrally.

2.3.2 Division of competence in social security

When there is a highly centralised administration restricting the financial and political development of local authorities how can municipalities and other local institutions take the decisions to improve social conditions at local level? The social security system is a matter for central government, vested in a specific institution currently called the Social Security Organization (SSO or SGK). Social assistance is

provided at local level as part of the social protection mechanism implemented by the municipalities.

Because of the strong administrative control exercised by the State, insufficient income and taxes, and a lack of autonomy at local level, local governments did not create the necessary needed to manage social assistance. The municipal organisations' welfare policies are therefore based on an unorganised form which tries to fix the aid mechanisms in response to local needs. That is why it is difficult to claim the existence of a decentralised form for social assistance at local level. The municipalities' social assistance policy is not based on standard rules due to regional inequalities and a wave of large-scale privatisation of the schemes for healthcare and education.

Competence with regard to providing social security is accorded to three decision-makers. These are firstly, the State, secondly, the local authorities and lastly, private organisations. This division of competence is best explained with reference to the healthcare and education sectors. Governmental regulations allow for the development of private initiatives. For example, on 1 January 2017, the individual pension scheme (BSE) was introduced, which became mandatory early in 2017.

2.3.3 Local responsibility or solidarity between local states/regions

Despite regional inequalities presenting a serious handicap for local development, there are many projects aimed at improving the economic and social situation. In 2012, the use of green cards, guaranteeing individuals free healthcare services at the public hospitals, accounted for 23.6 % of healthcare costs in rural regions, whereas this was 7.1% in urban areas (TUIK 2013). The central government also tries to encourage CEOs to invest in these regions by offering them investment incentives. However, regional risks such as terrorism and other security problems discourage such investors, which is why local solidarity is low in the eastern regions of the country.

Today, decentralisation is an administrative paradox because of the discussions on territorial integrity. Local activities in central areas are regulated by way of an administrative instrument called 'judicial trusteeship', especially in the Kurdish regions where many municipality mayors are on trial. The prefects, the district governor or officers nominated by the government assume the local responsibilities through systematic deconcentration. The ill-consolidated national unity leads the central government to suggest that centralisation would be the best way to protect territorial harmony. And thus the limited decentralisation soon becomes deconcentration.

2.3.4 Historical overview

'It would be an exaggeration to speak of a rich tradition of a local government, reaching deep down into the past, in Turkish history', said Ilber Ortaylı (2010, 45). Decentralisation occurred as a historical result of the Ottoman modernization wave. The first

local institutions were created as a result this modernisation; there was no regulated process of decentralisation during which budgets and political autonomy were attributed to the local authorities. Instead, the municipal services themselves were in charge (Ortayli 2008, 436). The imperial governors took their inspiration from the French territorial system in order to consolidate the political integrity of the Empire with regard to the modernisation.

The new republican State, founded in 1923, was not in a hurry to recreate the local governments. A new municipal law was introduced in 1930, based on the French model (Gözler, 2019). The central government believed that effective cooperation with local authorities was key to facilitating regional development. In the name of this regional development considerable responsibilities were given to local governments, especially to the provincial administrations. The political vision behind this stipulates that local entities are only expected to ensure the smooth running of public services. This political vision is now an administrative objective for individuals and the central government.

During the 1980s socio-demographical facts forced the central government to take more decentralising action within the administrative system. This resulted in the establishment of new 'metropolitan municipalities' in 1984 in response to the migration towards the big cities located largely in the west of the country. The creation of these units could be seen as an important initiative that still shapes the administrative policy in Turkey to this day.

The central government implemented many local administration reforms by modifying the laws. Law No. 5302 of 4 March 2005 on the special department administration limits the role of the prefects. These no longer determine the agenda for the meeting of the county council. Decisions taken by the council no longer need the approval of the prefect. Similarly, the departmental commission provides for five elected members of the county council elected by universal suffrage. This new law allows the special departmental administration to take the measures necessary for departmental development.

Another new law, n ° 5393 of 3 July 2005, on municipalities is also interesting. This law aims to implement a framework compatible with European regulations, in particular with the European Charter of Local Self-government (ratified in 1992 by the Turkish State with a reservation with regard to 10 paragraphs, because of the territorial integrity problem). There are also some budgetary and administrative autonomy changes at local authority level that should be noted. The Constitution also contains similar articles on the legal personality of local authorities. Another regulation in 2008 increases their financial resources, especially those from taxation.

Development Agencies were became part of the territorial administration during the EU accession process. In 2006, these agencies were established under the responsibility of the Ministry of Development with a view to reducing inter-regional disparities and income inequalities in Turkey. Currently, there are 26

development agencies in Turkey. It could be argued these agencies constitute the main core of the future.
In 2012, the central government decided to establish more metropolitan municipalities throughout the country by way of a legislative review, which is the codification of a new law. The law No.6063 of 2012 created 14 new metropolitan municipalities, extending their political and financial responsibilities to include the departments. There are now 30 metropolitan municipalities among 81 departments. The same regulation launched a new structure for the governorships of these 30 municipalities. Under this law, the government abolished the governorships' body, which is the special provincial administration composed of the general provincial council and the provincial committee (except for the prefect). This process can be seen as a deinstitutionalisation process in the territorial administration. Without the decision-making and supervisory institutions, increasing the prefect's responsibilities would cause the abuse of power in use.

2.4 Constitutional setting

The Constitution of 1961 plays a key role in the transformation of the State into a welfare state. The 1960 Constitution set out social rights in the economic, education and healthcare sectors. Article 48 established social security as an individual right, by giving the responsibility to the State, requiring it to ensure the physical and mental wellbeing of all individuals and to guarantee them medical care (Article 49). Article 50 defined the provision of educational services as being one of the foremost duties of the State.
Article 56 of the 1982 Constitution notes that *The State shall regulate central planning and functioning of the health services to ensure that everyone leads a healthy life physically and mentally, and provide cooperation by saving and increasing productivity in human and material resources. The State shall fulfil this task by utilizing and supervising the health and social assistance institutions, in both the public and private sectors. In order to establish widespread health services, general health insurance may be introduced by law.* The State has to take the necessary measures to establish the organisation for the provision of social security noted in the Article 60. Article 65 reemphasises that the State can execute its social and economic duties within the limits of its financial resources. This article could be interpreted as meaning that the private sector could be a new actor in the social field in the1980s. This new constitutional setting would be more compatible with the neoliberal public administration in Turkey.

2.5 Functional decentralisation versus territorial decentralisation

There are both internal and external factors that cause functional decentralisation to be ineffective. The internal elements can be divided into three different categories: the Turkish society's Sevres syndrome, the State's government problem, and

the traditional centralisation of the territories. The first category regards the political sensibility of the social groups with regard to the decentralisation process. The second category of factors regards the internal functioning of the State apparatus. As already noted, there is apparently a coordination and harmonisation problem among the civil and military bureaucratic institutions. This second issue gives birth to the third: the government addresses the centralisation process in order to protect its own existence at the national level.
The external reasons can be analysed with reference to the international factors that affect Turkey. The Europeanisation of Turkey strengthens the local character of the administration. However, the regional risks like terrorism, the civil war in Syria, and the Kurdish issue undermine the decentralisation of governance processes. In order to protect the territorial integrity, the government uses the taking of centralised decisions as a political tool even when, according to the constitution, the local authorities are competent to take such decisions.

2.6 Powers at the local decentralised level

Despite the centralist vision of the Turkish administrative system, the recent municipal law gives important duties and responsibilities to the local authorities with regard to social assistance and services. The Article 14 of this law defines the social role of the municipalities in their area. the law stipulates that the municipalities shall provide those social services that are located closest to the citizens according to the most appropriate method, but does not stipulate which method should be applied. The disabled, the elderly and the deprived and low-income earners always have priority with regard to these social services.

2.6.1 Policy

According to municipal law, the local authorities can establish the health institutions and the pre-school education institution, and provide financial aid to students, the disabled and the elderly. There is also an institutional movement to increase solidarity between the citizens. Municipalities can organise voluntary solidarity schemes to promote participation and provide social services to those in need. This municipal law allows municipalities and their inhabitants to determine the local social services need at a decentralised level.

2.6.2 Determination of claims and provision of services

There is no standard method to determine applications for social services. In practice, social assistance tends to focus on child and youth education, sports, the elderly, the disabled and the poor. Even when the duties of the local authorities are defined clearly by law, it should be noted that structural problems affect the implementation of these. Regional inequalities across the country exacerbate the problems that municipalities have in implementing their duties and the needs of each

municipality differ in line with the economic potential within each municipality. The methods applied to determine claims to social security must be clarified by the internal decisions taken by the various municipal organs. Therefore, in order to provide effective social assistance at a local level some degree of policy harmonisation between these organs is essential. Even when the provision of social services is legally decentralised, there is little evidence of any standardisation or effective structure.

2.6.3 Local authorities and the provision of services by third parties

Municipal law grants local authorities more room for manoeuvre by creating public-private partnerships. The law makes it possible for municipalities to cooperation with the private sector, to privatise their services and thus to establish companies having the same status as private businesses. With the authorisation of the Ministry of the Interior and the Council of State, the municipalities may have certain public services provided by private actors for up to forty-nine years.

While such public-private cooperation reflects the fact that private actors have become more visible in Turkey's public administration, this is not the case at the local level. There are not enough municipal health institutions and those hospitals that have been established by the local authorities work directly with, and are integrated within central government institutions. The State and the private care institutions are the main providers of healthcare services, leaving no room for the municipalities to pay a role in this area.

2.6.4 Supervision

Supervision is also carried out centrally by the ministers and some other public institutions. In 2003, the health transformation programme improved the provision of health services and health financing. The Ministry of Health became a supreme institution charged with supervising the public and private hospitals around the country. Under this programme the Social Security Institution (SSI or SGK), part of the ministry of labour and social security, assumes full responsibility for the country's social security system and for its supervision. Inspectors from the State and the Institution are commissioned to provide this supervision. There is also an internal unit, known as the internal audit department, that regulates and coordinates the institutional functioning of the SSI.

2.6.5 Financing

The municipalities' income and expenditure are set out in the municipal laws. The budget granted to the local authorities by the central government constitutes the municipalities' main source of income. This budget is directly financed from general taxation at national level. Municipalities can also establish private companies or cooperate with private actors to create financial resources or reduce costs and they can charge small fees or share fees for their social, cultural and sports facili-

ties. The Social Security Institution is entirely financed by the State as a part of the governmental body.

2.6.6 Decentralisation paradox?

Turkey has a centralized administrative structure. The country has always had structural problems that limit any decentralisation plans. This causes a decentralisation paradox: if the Turkish state was not decentralised in terms of political and administrative governance, it would be difficult to protect its territorial integrity, but if its administrative architecture was highly decentralised, it would lose its founding character of a nation-state and undermine the social structure. This is why the central government introduced the privatisation programme in the health and education system in the 1980s and goes a long way in explaining why the local authorities have so few responsibilities accorded to them by the central government with regard to social services. With a limited budget, they endeavour to provide for needy inhabitants in a deinstitutionalised and decentralised way.

3 The state of the debate and future perspectives

Decentralisation in the social domain is highly dependent on the politics of the central government as the main decision-maker in the country. In practice, social services programmes are implemented in a highly politicised manner. Bayırbag argues that '*welfare policies and thus distribution, constitute a key component of national solidarity and efforts at nation-state building. Therefore, redistribution-based conflicts in a developing country will more likely be formulated as broader criticism of the ideological foundations of that particular nation-state*' (Bayırbag, 2013 1128-1129). Social aid already became a political instrument in the elections used by both the local authorities and the central government. This politicisation of the public services could be explained with reference to the rescaling State process in Turkey.

The government has returned to a centralist vision of State in order to consolidate its authority that began to weaken during the elections of 2015. In order to reconsolidate its power, the government again assumed responsibility for security in the territorial administration and adopted centralised policies. Private actors increase in importance through their collaboration with the central government with regard to the social security system. The best example remains the private insurance scheme available to all employees.

It is argued that the neoliberal transformation in Turkey aims to reduce State intervention in social services; municipal laws give local authorities more powers to adopt social measures. However the local authorities' budget and lack of autonomy make them ineffective at a local level. In its activity rapport, published in 2015, the Union of Municipalities of Turkey advocated more decentralisation with regard to sports, culture, youth and social services. The report contained two proposals: the first that municipalities with sufficient resources can submit a

request to assume responsibility for the provision of these services. These services could be transferred to the municipality by way of a protocol signed by the local authority and the ministry. The second proposition regards the transfer of staff and funds (Union of Municipalities of Turkey 2015).

To conclude, there is no functional decentralisation in Turkey. Municipalities try to ensure that their social responsibilities are legislatively established as part of territorial decentralisation. It could be argued that private actors and privatisation have already become the prominent elements in the provision of social services, especially in the healthcare and education sectors. It should also be pointed out that recent government attitudes mean that decentralisation with regard to territorial administration in Turkey is currently impossible.

Devolution and decentralisation in social security: the situation in the United Kingdom

Guto Ifan and Ed Gareth Poole

1 A general picture of the system of social security and the administrative organization

The system of social security in the United Kingdom is highly centralized, complex, and consists of a large number of different schemes and benefits. This system is currently subject to major reforms and some decentralisation. As in most European countries, a distinction can be made between contributory social insurance provision and targeted social assistance.

Insurance-based benefits include benefits protecting against the risks of unemployment, pregnancy, incapacity for work, old age and death. Pension provision is by far the largest component of insurance-based expenditure. The new State Pension (introduced by the *Pensions Act 2014* to replace the Basic State Pension) is a flat-rate, single tier pension paid to all over state pension age who have a record of contributions to the National Insurance scheme; there is also an earnings-related supplement. The contributory Jobseeker's Allowance (JSA) provides six months' of non means-tested support for those who meet contribution conditions. Contributory Employment and Support Allowance (ESA) (and formerly the Incapacity Benefit) is also paid to those with long-term or chronic sickness, providing they meet the contribution conditions and a medical assessment of their inability to work.

The origin of the current system of National Insurance was the *National Insurance Act 1911*, which introduced benefits based on contributions paid by employers and employees in certain sectors. The Beveridge Report published in 1942 proposed expanding and unifying separate schemes into a system of social insurance. Its recommendations would provide the basis of the UK's post-war welfare state. A central element of the new structure put in place was a move away from the decentralised, discretionary system which had historically existed under localised *Poor Relief*. This led to social security in Britain to be centralised to an extraordinary degree (Spicker 2011, 55), with rules made at the centre, no significant role for local authorities, and little discretion for implementing officials.

However, the limited protection in practice provided by the National Insurance scheme led to an expanding role for *non-contributory social assistance* in the latter part of the twentieth century, while means-tested provision itself was also expanded in scope (Alcock and May 2014). This has resulted in means-testing of benefits being much more common in the UK than in most developed countries, with over 30 schemes administered by various government departments and local authorities (NAO 2011).

The UK government's *Welfare Reform Act 2012* introduced the legislative framework for a major policy reform known as Universal Credit, a social security benefit available for working age people both in- and out- of work. This single benefit is intended to replace six existing means-tested benefits and tax credits (Income Based Jobseeker's Allowance, Housing Benefit, Working and Child Tax Credits, Income Related Employment Support Allowance, and Income Support). Amounts awarded to claimants will be based on income, assets and family circumstances, and delivered as a single monthly payment. The reform has been described as the 'most comprehensive reform of the social security system since the Second World War' (Hood and Keiller 2016), and when fully implemented, will affect approximately eight million households (Millar and Bennett 2017).

A third category of benefits in the UK are those which are not based on contributions or income, intended for specific categories of people not covered by the insurance system. These include financial support for people with specific disability needs. Child Benefit had been the pre-eminent non-contributory, non-income related provision in the UK, though this scheme has become somewhat income-related since 2013.

Claimants have a right to most of the benefits they receive (subject to various conditions), with discretionary payments largely removed from mainstream social security provision (Alcock and May 2014). The main exception was the cash limited provisions of the Social Fund established in 1988, comprising Crisis Loans and Budgeting Loans (intended to cover sudden expenses and emergencies), and non-repayable Community Care Grants (CCGs) for certain persons leaving residential or institutional accommodation. Provisions in the *Welfare Reform Act 2012* resulted in the 'localising' of this type of support, with implications for the responsibilities of local government bodies (known collectively in the UK as local authorities), and the devolved governments in Wales and Scotland.

The financing of contributory benefits are covered by contributions paid by insured persons and employers. Six contribution classes are distinguished depending on the status of the individual. These contributions are deposited in the National Insurance Fund, which can also be supplemented with funds from general taxation. Meanwhile, non-contributory benefits schemes are fully financed from general taxation.

Since a 2001 departmental reorganisation, the administration of social security in Great Britain (that is, England, Scotland and Wales) has been primarily the respon-

sibility of the *Department for Work and Pensions (DWP)* under the authority of a cabinet-level Secretary of State. Since the 'Next Steps' initiatives of the late 1980s and early 1990s which split service delivery functions from central ministerial departments into semi-autonomous agencies, most operational tasks of the benefit system have been managed by independent agencies at arms-length from central government. The largest of these is *Jobcentre Plus*, which since 2002 has provided benefits and employment services to claimants of working age. Likewise, the *Pensions Service* administers benefits for pensioners.

HM Revenue and Customs (HMRC) administers child benefit, guardian's allowance and the tax credit system, although the implementation of universal credit will result in HMRC relinquishing its responsibility for the latter. Responsibility for administering some benefits lies with local, rather than central, government, notably housing and council tax benefits. As catalogued in section 3, local authorities have also recently gained responsibility for some discretionary benefits. They also administer a range of other cash transfers (for example, free school meals) and subsidised access to local services.

Statutes provide a general framework for social security legislation, while the main body of material law is provided by a range of statutory instruments, or regulations (Pieters 2002, 139). Social security legislation passed by the UK government mostly refer to Great Britain (covering England, Scotland and Wales). Separate legislation applies to Northern Ireland, but this is broadly identical to legislation in Great Britain (in line with the 'parity principle' explored in section 2).

2 The state of devolution

2.1 Historical remarks

Despite being a country consisting of four historic nations, conventional orthodoxy regarded the United Kingdom as a pre-eminent example of a state which had concentrated executive power at the central level and had resisted the global decentralizing trend (Paun & Hazell 2008; Shaw, MacKinnon and Docherty 2009). But a series of referendums that conferred new powers on democratically-elected territorial bodies in Scotland, Wales and Northern Ireland, followed in quick succession by new constitutional settlements granting additional powers over policy and taxation for these bodies, have transformed the United Kingdom into a polity rivalling Spain, Belgium and Italy as a venue for some of the most prominent centre-periphery territorial political competition in Europe.

Despite the prevailing conceptualisation of the UK as historically centralized state, a substantial literature disputes this by reconsidering the historical processes that created the modern state. Drawing from Rokkan & Urwin's formulation of a 'union state' (1983), Gay and Mitchell (2007, 243) argue that the UK was 'created over centuries through a series of unions each leaving a distinct legacy, especially in how

the components of the state relate to the centre at Westminster'. As such, it is better to conceive of the UK as a 'state of unions', rather than a 'unitary' or even a 'union state'. The history and legacy of each union has shaped the rationale for devolution in each of Scotland, Wales and Northern Ireland, helping to explain the UK's highly asymmetric system of government today.

England has long been the dominant part of the UK, and could be described as a unitary polity from very early times (Campbell 1995, 47). Wales remained distinctively separate until a clash of nation-state building projects led to the defeat of Wales by the Anglo-Norman English state in 1282. Wales was initially governed via a 'colonial constitution' (Wyn Jones 2005) and subsequently assimilated by the 16th century Acts of Union which fully integrated Wales into the English parliamentary system. However, a separate language, culture and nonconformist Protestant religion have kept Wales distinctive until contemporary times.

Unlike Wales, Scotland was not annexed but agreed to enter a Union with England in 1707. This political Union followed a century in which the crowns of England and Scotland had been unified under a single monarch. Although Scotland lost its separate parliament after the Union with England, it retained its own legal and educational system, and a Presbyterian (rather than Episcopalian) established state church.

Despite the absence of democratically-elected territorial bodies, some domestic policy has been administered separately for Scotland, Wales and Northern Ireland for many decades. A Central government minister and administrative department for Scotland (the Secretary of State for Scotland and the Scottish Office respectively) were established in 1885. Similar arrangements for Wales followed in 1965. These territorial ministerial departments assumed domestic functions from other UK departments such as education, health, economic planning, housing and local government.

Ireland was integrated into the United Kingdom in 1800, and the 1921 treaty dissolving this Union and creating the independent Irish Free State allowed six majority-protestant northern counties to remain in the UK, thereby forming 'Northern Ireland'. Northern Ireland was subsequently governed by a Protestant-led devolved government and parliament from 1920 which excluded the Catholic minority from full participation. On the collapse of this government at the onset of the 'Troubles', Northern Ireland was governed directly by a Westminster-appointed Northern Ireland Office and Secretary of State. These arrangements were replaced by the Belfast Agreement of 1998 which ended the 'Troubles' and established a power-sharing devolved government between both unionist and nationalist communities. Northern Ireland's powersharing administration has been suspended several times since 1998; during which time the UK government (via the Northern Ireland Office) assumes temporary control of executive functions.

In 1979, and in order to supplement the administrative functions of the UK government's territorial offices with an element of local democratic legitimacy, two refer-

endums were held on political devolution to Scotland and Wales. However, only 20% of those who voted backed the proposals in Wales, and although a small majority in Scotland voted in favour of devolution, the affirmative vote share fell below the 40% required for the measure to pass. While these referendum defeats might have been expected to keep devolution off the political agenda, the Labour Party's support for devolution grew steadily over the course of Margaret Thatcher's Conservative premiership. The incoming Blair government in 1997 pledged to offer two referendums in Wales and Scotland which were held in September 1997. A referendum seeking popular consent for the Belfast Agreement, including devolved powersharing, was held in May 1998. A large majority vote in favour in Scotland and Northern Ireland, and a much narrower vote in favour in Wales, led to reconstitution of the Scottish Parliament and a new National Assembly for Wales and Northern Ireland Assembly. These bodies all sat for the first time on an official basis in 1999.

2.2 Constitutional setting

Following affirmative votes in referendums in Scotland, Wales and Northern Ireland, the UK Parliament passed three devolution Acts: the *Scotland Act 1998*; the *Northern Ireland Act 1998*; and the *Government of Wales Act 1998*. These Acts established three devolved legislatures which hold varying degrees of power that had previously been held at the UK level. In the absence of a written constitution, sovereignty remains with the Westminster Parliament, which retains the power to amend the devolution acts, legislate in devolved areas, or suspend devolution (as happened under the *Northern Ireland (Temporary Provisions) Act 1972* which suspended the Parliament of Northern Ireland). Under the *Sewel Convention*, named after a UK government minister responsible for directing the legislation that led to the creation of the Scottish Parliament, the UK government will not normally legislate on devolved matters without legislative consent from the devolved legislatures. The three devolution settlements are highly asymmetric across the three devolved countries and have evolved rapidly since 1999.

Scotland Act 1998 to today

Scotland's devolution law specifies the policy areas that are 'reserved' to the UK, and all areas that are not named in this way are deemed to be devolved. The Scottish Parliament in Edinburgh (colloquially named *Holyrood* on account of its location opposite the Palace of Holyroodhouse) has primary law-making powers in the devolved areas. The growing electoral strength of the pro-independence Scottish National Party since devolution compelled the UK government to establish an investigatory committee to consider additional powers. The Calman Commission (2008-2009) recommended an element of fiscal decentralisation and additional policy responsibilities for the Scottish Government that would revise the existing divi-

sion of competences. In 2010, both the departing UK Labour administration and incoming Conservative-Liberal Democrat coalition led by David Cameron agreed to implement most of these recommendations and legislated for their introduction via the *Scotland Act 2012*. During the 2014 Scottish Independence referendum campaign, the 'No' campaign promised additional powers for the Scottish Parliament in the event of a majority vote to remain in the Union. A second Commission therefore met shortly after the referendum and published a set of proposals for additional responsibilities including broader taxation and welfare powers in November 2014. The UK government agreed with these proposals and devolved further competences via the *Scotland Act 2016.*

Government of Wales Acts 1998 and 2006 to today

Both public opinion and the devolution settlement have evolved perhaps even more rapidly in Wales than in Scotland. The *Government of Wales Act 1998* restricted the competence of the Assembly to the discretionary 'secondary' legislative or regulatory powers usually held by UK ministers within the framework of primary law. The newly-constituted Assembly was therefore generally restricted to making regulations rather than deciding the overarching policy frameworks in the 20 devolved 'subjects' such as local government and education. In contrast to the reserved powers model of Scottish devolution, these 20 subjects were specifically enumerated (or 'conferred') in the devolution legislation: all remaining powers were retained by Westminster.

These limited powers were deemed unsatisfactory soon after the establishment of the National Assembly. An investigatory committee known as the Richard Commission (2002-2003) made a number of recommendations with respect to the powers and electoral arrangements of National Assembly. Although the UK government did not proceed with several major recommendations, its own proposals would enable the Assembly to be granted primary law-making powers subject to a two-thirds majority vote in the Assembly, a popular referendum, and the assent of the UK parliament. The *Government of Wales Act 2006* enacted these proposals and divided Wales' devolved institutions into separate legislative and executive bodies that are today known as the National Assembly for Wales and the Welsh Government. The enabling referendum for fully devolved legislative powers was held in 2011, far sooner than initially expected, and was approved by a large majority. This result shifted Wales' devolution settlement to a new part of *the Government of Wales Act 2006*, conferring primary legislation-making powers on the National Assembly in the 20 devolved policy areas. Shortly after the passage of the reform, an additional investigatory committee known as the Silk Commission (2011-2014) recommended fiscal devolution and the replacement of Wales 'conferred powers' model of devolution with a 'reserved powers' model as in Scotland. These proposals led to the *Wales Act 2014* (pertaining to new tax powers for the Welsh Government and

National Assembly) and the *Wales Act 2017* (the reserved powers model of devolution).

Northern Ireland

The *Northern Ireland Act 1998* establishing the devolved powersharing Assembly and Executive enumerates two types of powers retained at the UK level: 'Excepted matters' (Schedule 2) which are unlikely to be devolved, and 'reserved matters' (Schedule 3) which may be devolved in future. The *Northern Ireland (St Andrews Agreement) Act 2006* modified the original Act to allow the Democratic Unionist Party and Sinn Fein to form an executive, eventually ending a five-year suspension of the Assembly between 2002 and 2007. The Northern Ireland Assembly is automatically dissolved if it is unable to elect a powersharing First Minister and deputy First Minister within six weeks of its first meeting – devolved powers are then exercised by the UK Secretary of State for Northern Ireland. A failure to elect a First Minister and deputy First Minister occurred after March 2017 elections and the Assembly remains suspended at the time of writing in 2019.

England in the United Kingdom

England is the only country of the UK not to have a devolved Parliament or Assembly: English domestic affairs remain the responsibility of the UK Parliament. As part of the Blair government's constitutional reform programme, a referendum on establishing a North East England Assembly was held in 2004 but was rejected by a large margin of voters in that region. Proposals for regional devolution were subsequently dropped by the Labour government, and government administrative offices and economic development agencies for the regions of England were abolished by the incoming Conservative-Liberal Democrat coalition in 2010. In place of large regional legislative bodies, the UK government instead pursed devolution to elected mayors in metropolitan 'city regions' of England. The Greater London Authority and Mayor of London was established in 2000; this development was followed by elected metropolitan mayors and 'combined authorities' in city regions including Greater Manchester, Liverpool, South Yorkshire and the West of England (Bristol). The patchwork of devolved bodies with asymmetric powers in England has however led to concerns that voters' interests in some form of English representation at the UK level were being ignored (for example, Jeffery et al. 2014) and fuelled a longstanding debate centring on the continuing rights of Welsh, Northern Irish and Scottish Members of Parliament (MPs) to vote on UK government policy pertaining only to England. This latter question led to the adoption of a system termed 'English Votes for English Laws' in the UK House of Commons after the 2015 general election, whereby legislation which affects only England requires the support of a majority of MPs representing English constituencies during a new stage in the legislative process.

2.3 The division of competences between the layers of government

2.3.1 State structure

The starkly asymmetric system of devolution in the UK is managed by the UK's Treasury Department which allocates funding to the Scottish, Welsh and Northern Irish governments according to the extent to which a specific policy is devolved. These percentages are published at the time of the UK's periodic multi-annual spending review and are known as 'comparability factors' that represent how much of a given UK department's spending is deemed to be devolved to Scotland, Wales and Northern Ireland. For example, as Education is completely devolved in all three countries, the 'comparability factor' is 100% for each country. Conversely, as the justice system is not devolved to Wales, the comparability factor is 0% in Wales but 100% in Scotland and Northern Ireland. These factors are frequently contentious because they play a major role in funding the devolved governments.

Table 1 Comparability factors of UK departments (HM Treasury 2015)

Department	Scotland	Wales	Northern Ireland
Business, Innovation and Skills	66%	66%	67%
Business Rates	100%	100%	100%
Cabinet Office	7%	7%	10%
Chancellor's Departments	0%	0%	0%
Communities and Local Government	100%	100%	100%
Culture, Media & Sport	77%	77%	78%
Education	100%	100%	100%
Energy & Climate Change	2%	2%	15%
Environment, Food & Rural Affairs	100%	99%	100%
Health	99%	99%	99%
Home Office	92%	0%	92%
Justice	100%	0%	100%
Law Officers' Departments	100%	0%	92%
Transport	91%	81%	91%
Work & Pensions	1%	1%	100%

The early period of devolution was associated with a very limited degree of fiscal devolution and responsibility over taxes and borrowing, which considering the high degree of spending autonomy was considered highly unusual from an international perspective (Silk Commission 2012). With the exception of some local government property levies and business rates, all taxes had been reserved to UK level.

Each devolved government was funded by an annual block grant from UK Government, which meant that devolved governments had very little control over the

size of their budgets at the margin. Annual changes to the block grants were determined by changes to government spending on comparable services in England, using the 'Barnett formula' (HM Treasury 2015). For example, if spending per person in England on education (an entirely devolved policy area) increased by £100, then a population share of this £100 per person would be added to the budgets of the devolved governments. Devolved government budgets have therefore been heavily linked to UK government policy, arguably constraining policy divergence.
The *Scotland Acts of 2012 and 2016* have transferred substantial powers over taxation to the Scottish Government, to the point where devolved and assigned revenue will account for almost half the Scottish budget (Scottish Government 2016). The *Wales Act 2017* also partially devolved income tax to the Welsh government, alongside powers over some minor taxes devolved in the 2014 Act.

2.3.2 Division of competences in social security

(a) Great Britain (England, Scotland & Wales)

Despite this rapid evolution of the devolution settlements in Scotland and Wales, competence over social security has primarily continued to be reserved at the UK level. Social security benefits can be described as 'some of the most centralised services' of the United Kingdom (Spicker 2015, 3). This is perhaps a legacy of the UK's historical position at its 'centralising peak when the structures that defined its modern welfare state were set in place after the second world war' (McEwen and Parry 2005, 49). Devolved competences lie mainly in the 'distributive' services, of health, education and social services, while the 'redistributive' functions of major taxes and benefits have largely remained reserved to the UK (Lodge and Trench 2014).
Schedule 5 of the *Scotland Act 1998* lists social security schemes as a reserved function and therefore outside the powers of the devolved government. Similarly, the *Wales Act 2017* also reserves social security schemes to the UK government. This has meant that uniformity in social security benefits, payments and entitlements has remained despite devolution, with the Department for Work and Pensions delivering the majority of social security functions across England, Scotland and Wales.
The devolved administrations' distributive powers have however provided an opportunity to expand some entitlements and some means-tested remission of charges related to devolved areas of education, health and social work. During the first decade of devolution, there was a clear policy trend towards universalist provision in Scotland and Wales (McEwen and Parry 2005, 57), such as the abolition up front tuition fees in Scotland and introduction of learning grants in Wales. Universalist provision was aided by the benign situation for UK public finances over this period, with ever-increasing budgets that allowed the devolved governments to meet the costs of expansionary policies.

The interdependence of (reserved) cash benefits and services under devolved competence has the potential to create disputes between the UK and devolved governments (Keating 2002). A prominent disagreement followed the introduction of 'free personal and nursing care' by the Scottish Government (Simeon 2003). In response to the expansionary policy in Scotland, the UK Treasury ruled that recipients in Scotland would no longer be entitled to the UK attendance allowance benefit, an allowance for personal care for the disabled and those over 65. This decision reduced the cost to the UK social security budget and did not provide the Scottish devolved administration with the expected additional funding. Instead, the Treasury and DWP had resisted any attempt to relinquish any funds saved as a result of devolved policy changes (McEwen and Parry 2005, 57).

(b) Northern Ireland

The constitutional division of competences in social security is quite different in Northern Ireland than it is in Great Britain. The *Northern Ireland Act 1998* continued the earlier devolved arrangements where social security would not be listed as a reserved or excepted matter and therefore would be devolved. In practice however, the principle of *parity* has been adopted to maintain social security benefits at the same level as in Great Britain, and this is normally implemented through the passage of separate Northern Ireland legislation that simply copies Westminster legislation for Great Britain (Birrell and Gray 2014, 206). Section 87 of the *Northern Ireland Act* requires cooperation on the coordination of social security systems between Northern Ireland and Great Britain. This system did allow however for some devolved discretion, particularly in social security administration. Responsibility for the delivery of social security in Northern Ireland rests primarily with the Social Security Agency (part of the Department for Communities of the Northern Ireland Executive).

Funding is clearly a key imperative underpinning parity (Birrell and Heenan 2010), stemming from the fact that an annual transfer is made from the GB National Insurance Fund to cover benefit costs that cannot be met from contributions raised in Northern Ireland, and non-contributory benefits are fully funded by the UK government outside the block grant from which other devolved services are funded. The UK Treasury position is that the devolved administration should not be subsidised to enhance benefit provision, and that any savings generated by devolved government actions should be returned to the Treasury. Birrell and Heenan (2010) argue that major policy divergences in this area are unlikely to be agreed by the Northern Ireland Assembly because of the likely major (and negative) financial implications.

Despite social security remaining as a UK competence at least in Scotland, Wales and England, recent years have seen a partial but significant shift away from this highly centralised system of social security. As Simpson (2017, 265) comments, the social union between the countries of the UK 'remains in a state of flux'.

Two factors have driven this trend. First, several aspects of the UK Government's *Welfare Reform Act 2012* intersected with devolved competences, provoking a hostile response from the Scottish and Welsh governments and a debate in Northern Ireland on the meaning of the principle of parity. Second, the rise of the Scottish National Party and the narrow vote against Scottish independence in 2014 prompted the partial devolution of social security to Scotland.

The most obvious effect of the UK government's welfare reforms on devolved government competences was the abolition and decentralisation of some social security schemes in England (outlined further in section 3). Responsibility for replacement arrangements in Wales and Scotland was given to the devolved administrations, while in Northern Ireland, such benefits would consequently be considered outside 'parity' considerations, and would therefore be subject to possible amendment.

The *Welfare Reform Act 2012* abolished some discretionary elements of the social fund which provided discretionary financial assistance to people facing unforeseen emergencies and assisted people leaving residential or institutional care. Funding was transferred to the devolved governments for replacement schemes. The Welsh Government created the centrally-administered Discretionary Assistance Fund for Wales, while the Scottish Government introduced a national scheme called the Scottish Welfare Fund (administered by local authorities). The closing of the Independent Living Fund (ILF) in 2015, a discretionary source of funds for applicants to live in the community rather than in residential care, also expanded the role of the devolved governments in the provision of discretionary benefits. The devolved administrations in Scotland, Wales and Northern Ireland would decide how the ILF recipients in their countries would be supported in future, with funding transferred from the UK government. The scheme was replaced by national schemes in Scotland (which also administers cases for Northern Ireland) and Wales. Local governments in Wales and Scotland (under devolved control) are also responsible for delivering Discretionary Housing Payments (DHPs), which are paid out when claimants experience a shortfall between rent due and the Housing Benefit payable. Both governments provided additional funding for DHPs to mitigate the reductions in Housing Benefit entitlements for certain recipients (especially in response to the measure of cutting housing benefit for people deemed to have a spare bedroom in their home – commonly referred to as the 'Bedroom tax').

The *Welfare Reform Act 2012* also provided for the abolition of the Council Tax Benefit, essentially a means-tested rebate for the local property tax paid to local authorities. Initial funding was transferred to the devolved administrations, though with a 10% cut from the previous year. The Scottish and Welsh governments both introduced centralised Council Tax support schemes.

By replacing several income-based schemes by Universal Credit, the coalition's welfare reform measures also affected some 'passported' benefits and services provided by the devolved governments based on eligibility criteria for existing DWP

benefits. These include free school meals, concessionary travel, education maintenance allowances, and legal aid (in Scotland). This required new eligibility criteria for these benefits and services, and led to the Scottish Government introducing the Welfare Reform [Further Provision] [Scotland] Bill in 2012.

Perhaps the greatest impact of the *Welfare Reform Act 2012* on devolution however was felt in Northern Ireland. Whereas passing separate legislation for social security in Northern Ireland to replicate legislation for Great Britain is usually considered a formality, it proved difficult for political parties in the power-sharing Northern Ireland Executive to agree consent for the Welfare Reform Bill. Both the main parties in the executive – the Democratic Unionist Party (DUP) and Sinn Fein – agreed that welfare reform should recognise the unique circumstances of Northern Ireland, with evidence indicating that it would be the area most effected by the changes to benefits. This resulted in a two-year delay in the legislative process and the ultimate defeat of the Bill in May 2015. Under the terms of the 'Fresh Start' agreement of November 2015 between the Northern Ireland Executive and the UK government, primary legislation was brought back into line with Great Britain through the short-term transfer of social security competences to Westminster (Simpson 2015).

However, this agreement did permit social security in Northern Ireland to deviate from welfare reforms in Great Britain in crucial ways. Concessions were agreed for Northern Ireland, mainly of an administrative nature: Universal Credit would be paid twice monthly instead of monthly; payment could be split between two parties in the household instead of a single payment; and the housing element would by default be paid to the landlord rather than the claimant (Birrell and Gray 2014). The maximum 'sanction' period (when benefits are withdrawn from claimants) would also be shorter in Northern Ireland, and the Northern Ireland executive would be able to fund a four-year disapplication of the so-called 'Bedroom tax' described above. Though it remains to be seen whether this represents a new precedent for the Northern Ireland Executive to reject wholesale reforms made at Westminster (Simpson 2017), devolved legislators are now 'less willing to accept that parity can simply be justified by default' (McKeever 2016, 7). Such concessions inspired lobbying efforts by the Scottish and Welsh Governments for similar opportunities (Birrell and Gray 2014), and the flexibilities afforded to Northern Ireland influenced the eventual powers devolved to the Scottish Government.

The territorial dimension of social security politics also relates to the second key factor driving social security devolution across the UK in recent years, namely the rapid change in politics in Scotland. The Scottish National Party came to power as a minority administration in the Scottish Government in 2007 and won a majority at the 2011 devolved elections with a manifesto commitment to a referendum on independence. Following the Edinburgh Agreement between the UK and Scottish governments which permitted a legal referendum, the *Scottish Independence Referendum Act 2013* was passed by the Scottish Parliament and a referendum was held in

September 2014. Social security became a key focus for both sides of the independence campaign.

The Scottish Government's Expert Working Group on Welfare outlined several immediate departures from UK government policy that an independent Scotland could take, as well as a longer-term vision of a different welfare system (Expert Working Group on Welfare 2013). The Yes campaign during the referendum attacked the welfare reforms of the UK government, presenting independence as a means to protect the foundations of the welfare state being eroded by successive UK governments (Mooney and Scott 2015). As McEwen (2013) argues, this was done to underline Scotland's distinctive values, and 'portray a picture of an independent Scotland that would preserve the rights of social citizenship'.

As detailed in section 2, immediately after the 'No' vote in the Scottish independence referendum, the UK government established a new investigative commission to bring forward new proposals of fiscal and welfare decentralisation that were agreed by all major political parties. These recommendations subsequently formed the basis of the *Scotland Act 2016*.

The *Scotland Act 2016* devolves approximately £2.8 billion of benefit expenditure to the Scottish Parliament (based on 2015-16 figures), over 15% of total benefit spending in Scotland. This will be in addition to the £371 million which was spent on the already devolved Council Tax Reduction Scheme and the Scottish Welfare Fund.

Table 2 Devolved Social Security Benefits under the Scotland Act 2016, 2015-16 (£m)

	2015-16
Disability Living Allowance	1,399
Attendance Allowance	487
Carer's Allowance	224
Winter Fuel Payment	180
Personal Independence Payment	315
Industrial Injuries Disablement Benefit	91
Severe Disablement Allowance	49
Discretionary Housing Payments	13
Cold Weather Payment	3
Funeral Payment	4
Sure Start Maternity Grant	3
Total expenditure on benefits to be devolved	**2,768**
As share of total benefit spending in Scotland	**15.3%**
Total benefit spending in Scotland (including state pension)	**18,345**

Source: Government Expenditure and Revenue Scotland 2015-16

Table 2 summarizes the benefits recently devolved to the Scottish Parliament. Although there may be opportunity to deviate or replace these, this power can only be exercised within the terms of the 2016 legislation. For example, the Act predefines who can be entitled to the Carer's Allowance. This constrains the potential for expanding welfare entitlement or developing alternative or innovative policies (McEwen 2015).

The vast majority of devolved benefit expenditure relates to support for carers, disabled people and those who are ill, as well as payments currently part of the 'regulated social fund'. The Scottish Parliament has also been granted the power to make administrative changes to the UK government's Universal Credit and to vary the housing cost element, similar to the concessions granted to Northern Ireland described above.

To administer these devolved responsibilities the Scottish Government has established a new agency, named *Social Security Scotland*, by way of the Social Security (Scotland) Act 2018. Approximately 35% of Scottish households will receive benefits from both UK and Scottish agencies (Bell 2016). The establishment of this new social security agency will require intergovernmental coordination to ensure that claimants do not fall between the gaps (McKeever 2016; 2017). Spicker (2015) argues that devolving some benefits and not others enhances the potential for claimants to fall between the gaps and overlaps between benefits, for example, creating situations where raising benefits in one place led to loss of benefit in another. A Joint Ministerial Working Group on Welfare (with ministers from both governments) was established in February 2015 to provide a forum for discussion and decision-making in implementing welfare devolution, a body which meets regularly.

As well as the legislative limitations outlined above, there will also be strong financial limitations and pressures on Scottish policy-making on social security. Under the terms of a new 'fiscal framework' agreement signed by the two governments, an initial baseline addition to the Scottish budget will be made in line with the UK government spending on these benefits in Scotland immediately prior to devolution (HM Treasury 2016). Thereafter, this funding will change according to the Barnett formula (outlined in section 2.c.i); according to changes in per person spending on these benefits in the rest of the UK. This means any Scottish deviation away from UK government policy will have to be funded by reallocating money from other budgets or by using its newly devolved fiscal powers. Scotland's more rapidly ageing population will also pose fiscal challenges, especially since around half of the benefits to be devolved are directed towards senior citizens.

2.3.3 Local responsibility or solidarity between local states/regions

The idea of solidarity between the different countries of the UK, and the contemporary conceptualisations made by pro-Union politicians of the UK as a 'social union', is frequently prominent in debates over social security devolution. Argu-

ments made by central government and policy-makers from different parties often stress the importance of equal provision of social security in all areas of the UK. For example, the UK government's Scotland Office (2009) described the social security system as the 'most explicit expression' of the UK's social union, in that it 'ensures that people across the UK have access to the same support in time of need'. Similarly, in its response to the Silk Commission on Devolution in Wales, the UK government rooted its opposition to social security devolution in the 'parity principle'; that 'as people throughout the UK pay consistent rates of NI contributions and non-devolved taxation, they should also be entitled to consistent rights and benefits' (Wales Office 2013, 90).

Although an advocate of additional devolved powers in most fields, the former Labour First Minister of Wales, Carwyn Jones argued in 2014 that 'I place a strong value on the fact that we all have an equal claim on the safety net that protects us… I see social security as one of the core components of our common citizenship.' This view of social security echoes a historically-dominant perspective on the British left associated with prominent former Labour politicians such as Aneurin Bevan and Neil Kinnock. Bogdanor (1999, 169) summarized this view as believing that a 'different standard of social welfare in different parts of the country (threatens) the very foundations of the Welfare State'.

The high degree of regional economic inequality in the UK also plays a role in discussions over social security devolution. As can be seen in table 3, spending on social protection per person varies significantly between the countries of the UK, even though they are provided on an equal basis across the country. As a result, there is a perception that poorer nations may lose out if such support were to be devolved (for example, see Bradshaw 2014).

While public opinion data do not suggest large difference in perceptions and feelings towards social security in Scotland or Wales (Curtice and Ormston 2011; Henderson et al. 2013), elite discourse in these countries tends to reflect more redistributive and pro-welfare values (Greer 2007). Such discourse has been amplified in opposition to welfare reform since 2010, fuelling demands for more local control and responsibility over social security.

There is also a realisation that devolution of health and education for instance have not led to varying levels of entitlement. From a Welsh perspective, some have commented that Wales would not necessarily suffer financially under a similar fiscal framework as Scotland (for example, Bevan Foundation 2016). With social security essentially becoming a 'shared' competence in Scotland and Northern Ireland, we may see further interest in social security devolution in Wales, as is often the case in asymmetric devolution settlements, where the desire to 'keep up' with others drives demands for additional powers (Simpson 2017).

Table 3 Spending on social protection* (excluding social services), 2015-16

	£ per person				£ per person (England = 100)			
	England	**Scotland**	**Wales**	**Northern Ireland**	**England**	**Scotland**	**Wales**	**Northern Ireland**
Sickness and disability	620	776	908	1.271	100	125	146	205
Old age	1.600	1.709	1.811	1.748	100	107	113	109
Survivors	15	32	23	42	100	213	153	280
Family and children	235	218	245	268	100	93	104	114
Unemployment	39	49	50	76	100	126	128	195
Housing	411	382	387	315	100	93	94	77
Social exclusion	476	421	516	549	100	88	108	115
Social protection (excluding social services)	**3.396**	**3.587**	**3.940**	**4.269**	**100**	**106**	**116**	**126**

Source: HM Treasury Country and Regional Analysis, 2016.

*As classified by United Nations' Classification of the Functions of Government (COFOG)

3 The state of decentralisation

3.1 Historical remarks

In many ways, modern British welfare has its roots in the initiatives of local, rather than central government. Local services for health, social assistance and education were established during the 19th century and were delivered by the *Poor Law* guardians; as a result such this became the core of a reformed local government system. Historically, social security became more centralised over time. After the Second World War, local government lost responsibility for areas such as health, social security and public utilities.

In the 1970s, local government was reformed to form two main tiers (county and district) in most of Britain. Since then, unitary (single-tier) authorities have been widely established, though two-tier authorities are still common. The two tiers have distinct functions, though they sometimes overlap. There are 343 principal local authorities authorities in England, of which 125 are single-tier authorities. Local government is devolved to Scotland, Wales and Northern Ireland: Wales has 22 unitary authorities, Scotland has 32 unitary authorities, while Northern Ireland

has 11 'district councils'. As will be seen below, the role of local government differs in each country.
Recent UK government efforts to strengthen local accountability and reduce central spending have resulted in several elements of social security being decentralised to the local authorities in England and devolved administrations in Wales and Scotland (as described in section 2).

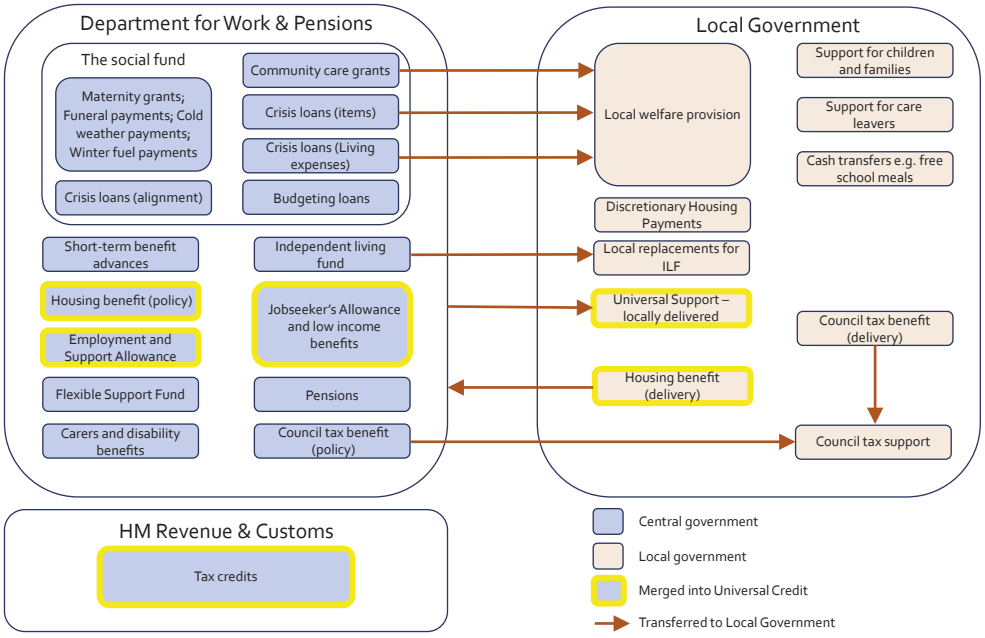
3.2 Constitutional setting

UK local authorities have few powers to act other than where they are expressly authorised by law to do so. However, they have a wide range of statutory duties that they are required to fulfil, and a wide range of permissive powers enabling them to undertake defined activities if they so wish.
They also have a small number of 'general' powers – the *Local Government Act 1972* permits authorities to incur expenditure that is in the interests of their area, subject to certain conditions. The *Local Government Act 2000* contained the general power to 'promote economic, social and environmental well-being' of their area, and enables them to provide financial assistance to any individual. As explored below, this has enabled transfer of responsibility for some social security schemes to local authorities under powers contained in existing legislation (DWP 2014, 5). The *Localism Act 2011* also introduced a new 'general power of competence' for local authorities in England.

3.3 The powers of the local decentralised level

Recent welfare reforms, the UK government's 'localisation agenda' and significant efforts to reduce the national deficit since 2010 have all influenced the role played by local authorities in social security, particularly in England.
Figure 1 illustrates how responsibilities for certain social security schemes have been transferred from central to local government in England in recent years.

Figure 1 **Recent reforms and decentralisation in non-contributory social security schemes in England**



The discretionary elements of the Social Fund provided discretionary, often 'last resort', loans and grants to individuals, and comprised of Crisis Loans (financially assisting people facing unforeseen emergencies), Budgeting Loans and non-repayable Community Care Grants (CCGs – mainly assisting people leaving residential or institutional care). As a result of the *Welfare Reform Act 2012*, CCGs and Crisis Loans were abolished to be replaced by provision delivered by local authorities in England, schemes sometimes referred to as Local Welfare Provision.

The *Welfare Reform Act 2012* also provided for the abolition of Council Tax Benefit (CTB). Council Tax is a property tax paid to local authorities, and this benefit reduced the amount of council tax that low-income households had to pay (essentially a means-tested rebate), often entirely. Provisions for the creation of localised schemes in England to replace this nationally devised system were included in the *Local Government Finance Act 2012*.

The Independent Living Fund provided cash payments to disabled people with support needs, delivered by an executive non-departmental public body of the DWP. It was permanently closed in June 2015 and responsibility for supporting recipients in England was transferred to local authorities.

These additional responsibilities for local authorities were added to some existing functions relating to social security. Discretionary Housing Payments (DHPs) are administered by local authorities and paid out to claimants when they experience a

shortfall between the rent due and the Housing Benefit payable. Funding for DHPs was increased by the UK government to mitigate reductions to Housing Benefit entitlement introduced between 2010 and 2017. Although the administration and delivery of Housing Benefit was previously the responsibility of local authorities, this benefit is currently being merged into the centralised Universal Credit system, alongside a number of other means-tested benefits. Until Universal Credit is fully implemented, local authorities are responsible for enforcing a maximum recipient funding limit known as the 'benefit cap'. This cap is designed to ensure that no individual or household is in receipt of benefits to a value greater than average earnings after tax and national insurance. This cap has been achieved on a temporary basis by adjusting Housing Benefit entitlements.

As discussed in section 2, the elements of social security that were 'localised' in England were simultaneously transferred to the devolved governments of Scotland and Wales. The devolved governments have often rejected the localised approach of the UK government in England. Instead of introducing a localised welfare schemes to replace Community Care Grants and Crisis Loans, the Scottish Government introduced a national scheme called the Scottish Welfare Fund (which is however administered by local authorities), and the Welsh Government created the centrally-administered Discretionary Assistance Fund for Wales. Both governments also introduced centralised Council Tax support schemes rather than devolving policy to local authorities. The Independent Living Fund was replaced with national schemes in Scotland (which also administers cases for Northern Ireland) and Wales, though the Welsh scheme has been decentralised to local authorities from 2018 onwards. Meanwhile, there has been no decentralisation of these social security schemes in Northern Ireland.

3.3.1 Policy, determining of claims and delivery of services

Whereas the role of local authorities in social security in the past was mainly administrative (for example administering Council Tax and Housing Benefits), they now have a more active role in devising their own benefit schemes and eligibility criteria. They have been given relatively extensive flexibility over policy and the determination of claims in the case of decentralised social security, reflective of the discretionary nature of the benefits that have been decentralised. The level of statutory requirements and regulation placed on local authorities by Central Government varies between the various social security schemes.

In the case of Local Welfare Provision (replacing CCGs and Crisis Loans), local authorities are under no obligation to provide any particular form of support, leaving the system with no statutory force. The Government did not impose any new duties on local authorities, maintaining they would be open to scrutiny at the local level for the decisions they took. However, guidance was provided by the DWP setting out general expectations that central government had of local authorities.

The lack of statutory obligations was a cause of concern for charities in response to a DWP consultation.[1]

Although councils provide similar support to the previous schemes (for people in emergencies and to help people remain or resettle in the community), there has been some notable variation between local authorities in England (NAO 2016, 22). Some local authorities advertise a broader range of support than others, spend different amounts on similar types of support, and vary the length of time they provide crisis support. A big change from the formerly centralised scheme has been the shift away from providing cash support to providing goods in-kind, with furniture and consumer utility goods accounting for most of local welfare spending (ibid, 25). The majority of local authorities in England have moved away from providing loans, due to the costs involved in retrieving repayments (which was previously done by DWP by deducting amounts from benefits).

The *Local Government Finance Act 2012* requires local authorities in England to devise their own Council Tax Reduction Schemes, reducing Council Tax liabilities 'to such an extent as the billing authority thinks fit.' The framework within this must be done is contained in Part 1 of Schedule 4 of the Act, which sets out the type of considerations an authority may take into account in deciding support provided, including capital and income levels of claimants and the number of dependents. Although reductions could take a variety of forms and levels, the UK government has prescribed (by regulation) that support for pensioners must be maintained, and that they were protected from any adverse consequences of the change. As part of cost-reducing requirements (see financing section below), most local authorities have imposed criteria to limit support, for example by imposing minimum Council Tax payments for working-age people, reducing savings thresholds, and changing the 'income taper' (the rate at which support is withdrawn as income rises) (Bushe, Kenway and Aldridge 2013).

Whereas the DWP previously determined eligibility criteria for claimants of the Independent Living Fund, each local authority now has responsibility to determine its own criteria. The amount of support provided therefore varies from authority to authority.

Local Authorities are also under no obligation to pay Discretionary Housing Payments. The level and number of awards for these payments also vary between authorities. This can be driven by differences in the local housing markets and the varying effects of welfare reforms across the county that the payments are intended to mitigate against.

1. For example, see page 41 of http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP11-48

3.3.2 Local authorities and third party service delivery

In order to minimise administration costs and coordinate different forms of support to individuals, the majority of local authorities run their own local welfare schemes, typically locating local welfare provision within their existing revenues and benefits service (NAO 2016, 19).

A 2014 DWP review of local welfare provision also noted that local authorities had not only been able to align their schemes with existing services, but had also been able to work with other organisations to support claimants. Of those local authorities that provided information to the DWP review, around 33% of local authorities established some type of contracted provision to administer the funds on their behalf, and a similar number stated that they had coordinated provision with the voluntary and community sector.

In Wales, while not being decentralised, the Welsh Discretionary Assistance Fund is delivered on a national basis by the Northgate Public Services in partnership with other organisations, after a competitive tendering process.

3.3.3 Supervision

Since the decentralisation of certain elements of social security, concerns have been raised that there is no official or systematic national oversight of the schemes introduced by local authorities (Social Security Advisory Committee 2015).

3.3.4 Financing

The system of financing local government in the UK has traditionally been highly-centralised. Funding has come from three main sources: domestic property tax revenues (council tax); general grants from central government (including the redistribution of non-domestic property tax revenues); and ring-fenced grants for specific areas.[2] Grants distributed from central government tended to be allocated based on spending needs or on the basis of particular central government objectives. Local authorities have traditionally only had very little discretion on the overall size of their budgets. However, the introduction of the Business Rates Retention Scheme (BRRS) in England in 2013-14 represented a move towards providing a 'fiscal incentive' for local authorities.

The decentralisation of social security schemes outlined in the previous section has come during a time of significant cuts to local authority budgets. Funding for local authorities in England has cut almost 26% in real terms since 2009-10 (Amin-Smith et al. 2016). Furthermore, as responsibility for some benefits have been handed down to local authorities, funding budgets allocated for these benefits have been

2. The UK government is responsible for the financing of Local Government in England, while responsibility for funding Welsh and Scottish Local Government rests with the Welsh and Scottish Governments respectively. Until recently, the three nations had similar systems of funding local government. The system of local government in Northern Ireland is very different.

reduced before and after decentralisation. Central government funding for local authorities has generally been non-ring-fenced by central government.

In the first year of decentralisation, the budget for Community Care Grants and Crisis Loans were passed on in full to local authorities in England and the devolved administrations on a non-ring-fenced basis, along with additional administrative funding, to fund local welfare assistance. This was awarded geographically along the lines of existing spending patterns. However, it should be noted government spending on these schemes in years before decentralisation had decreased significantly (NAO 2016, 15). This amount would be reduced in the second year, in line with the Government's expectation that there would be efficiency savings through the new services being locally aligned with existing services (DWP 2014). Although uncertainty around demand levels led to 78% of local authorities to underspend their allocation in the first year (DWP 2014); this level of underspending reduced in subsequent years (NAO 2016). A report by the Centre for Responsible Credit (2015) recommended ring-fencing the grants in order to protect funding for local welfare schemes (Gibbons 2015).

Funding for Council Tax Support schemes was cut explicitly by 10% from the level of the centralised Council Tax Benefit scheme, with the expectation that local authorities would decide where the resulting cuts would be implemented. Funding was provided through the Business Rate Retention Scheme rather than through a separate grant, again on a non-ring-fenced basis. Although the funding was initially separately identified, this has not happened in subsequent years (Wilson and Murphey 2016, 9). Replacement funding for the Independent Living Fund was also provided via a non-ring-fenced grant from central government. The charity Disabled Rights UK raised concerns that not ring-fencing this funding would lead to reductions in support in some areas (Jarrett 2018). Discretionary Housing Payments are also funded via DWP allocations, while local authorities are allowed to spend up to two and half times their allocation.

In face of steep cuts in local budgets and non-ringfenced grants, a report by the Social Security Advisory Committee (2015, 33) noted wide-spread concern amongst local government officials over the financial sustainability of local social security schemes, and suggested that the benefits of decentralisation would be lost without continued investment. The Local Government Association noted that lack of funding meant that local authorities were extremely constrained in their ability 'take a holistic and integrated approach to addressing people's broader circumstances' in delivering their local welfare schemes (ibid.). The Social Security Advisers in Local Government group noted the 'perception of localisation of welfare support as means to an end and a cost cutting exercise'.

The decentralisation of funding for these benefits represents a large transfer of financial risk. Whereas the UK government budget can respond to deteriorating economic conditions, local authority budgets are far more constrained and responding to variations in demand for assistance is far more challenging (House

of Commons Work and Pensions Committee 2016). Welfare devolution has accompanied wider Local Government finance reform in England towards a more self-reliant system in which more spending and revenue risk lies with individual authorities (Amin-Smith et al. 2016). Although this provides local authorities' with much more of a stake in the economic well-being of their areas, it does raise questions about their ability to provide the emergency social security schemes now under their control.

4 The state of the debate and future perspectives

With its origins in *the National Insurance Act 1911*, the social security system in the United Kingdom has traditionally been viewed as long-developed and highly centralized. The Department of Work and Pensions, the government body that administers social security in Great Britain (England, Scotland and Wales) is the largest public body in the UK, paying out GBP177 billion in benefits in 2017-18. Indeed, a major recent overhaul of the benefits system – the 2010-2015 UK coalition government's *Universal Credit* programme – will further centralize aspects of benefit administration including the transfer of tax credits element of social security to this central government department.

Equally however, two major political and public policy developments over the same period have generated significant decentralizing pressure on the UK's social security system.

The first of these has been the pressures for additional devolution from the three constituent countries of the UK with devolved legislatures and governments. In Scotland, widespread demands for additional powers for the Scottish parliament culminated in a 2014 referendum on independence. While lost, the cross-party process set up in the immediate aftermath of the 'No' vote resulted in GBP2.8 billion of benefit expenditure – more than 15% of all benefit spending in Scotland – being devolved to the Scottish Parliament. The Scottish Government responded by establishing a new cabinet portfolio for Social Security and a new agency to administer devolved benefits, *Social Security Scotland*. As was previously the case in relation to taxation powers, devolution of welfare benefits to Scotland has subsequently influenced the debate in Wales. In 2019, the incoming Welsh First Minister expressed his view that 'we ought to explore the devolution of [welfare] administration. We want to do it carefully, but I think the case is made for exploration', and a National Assembly for Wales committee launched an inquiry into the administration of benefits in Wales in reference to Scottish social security devolution. And in Northern Ireland, while 'parity' with Great Britain has previously been rigidly applied in the province's separate welfare system, new deviations in social security administration have recently emerged. These include more frequent welfare payments to claimants, direct payment of housing benefits to landlords rather than tenants, and shorter maximum 'sanction' periods where benefits are

temporarily withdrawn from individuals. In the three devolved countries of the UK therefore, pressures for additional devolution of at least some elements of social security are likely to continue.

The second pressure on the UK's traditionally-centralized social security system has been welfare reform programmes and austerity budgets which have decentralized discretionary provision across the UK (and not just in the three devolved countries). Responsibility for a number of discretionary loans and grants previously managed as part of the Department of Work and Pensions' Social Fund were transferred to local governments in England and the devolved governments in Scotland and Wales. Previously simply administrators of various benefits, local governments now have a more active role in devising their own benefit schemes and eligibility criteria, with relatively extensive flexibility over policy and the determination of claims over the localised schemes. Having implemented large-scale budget cuts since 2010, most local authorities have imposed criteria to limit eligibility or the level of support provided. With little prospect of rapid increases in local government budgets over the next decade, a continuation of this process of transferring responsibility to lower-tier bodies and limiting eligibility appears likely.

Along with the UK's vote to leave the European Union, these political tensions between centralisation, devolution and decentralisation will continue to dominate UK social security in the decades to come.

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